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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 463

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION; THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION; AND THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION,
Petitioners,

vs.

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR; FRANK A. THOMPSON, TRUSTEE, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR; AND BERRYMAN HENWOOD, TRUSTEE, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEBTOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners respectfully pray that a review of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit on writ of certiorari be granted, and, in support of their petition, allege:

Statement of the Matter Involved.

This action, brought under the Federal Declaratory Judgments Act, involves the ownership and distribution of sums paid by the Government for the transportation of Government freight over two or more connecting railroads, pursuant to the terms of those roads' individual land grant equalization agreements with the Government. It is the first case arising in this field of the railroad business to come before the courts, and it is not possible to make an informative statement of the matter as concise as petitioners would prefer.

Petitioners, sometimes referred to as the Central roads, operate railroads in Central Freight Association Territory which lies east of the Mississippi River and north of the Ohio River. Respondents operate railroads in Southwestern Freight Bureau Territory west of the Mississippi River.

Railroads constructed with the aid of Government land grants are required by statute[1] to handle Government freight over actual land grant mileage at 50% of the rate which "the public at large" would pay for the same service. In practice, this casts a burden upon every road which competes with an aided road for a share of Government business. The non-land grant road must agree to equalize the land grant deductions available to

[1] "10 U.S.C. § 1375. Charges for transportation by land-grant railroads subject to regulation by Congress. Payment shall be made at such rates as the Secretary of War shall deem just and reasonable and shall not exceed 50 per centum of the full amount of compensation, computed on the basis of the tariff or lower special rates *for like transportation performed for the public at large*, for the transportation of property or troops of the United States over any railroad which under land-grant acts was aided in its construction by a grant of land • • • subject to such regulations as Congress may impose restricting the charge for such Government transportation, and such payment shall be accepted as in full for all demands for such service." 43 Stat. L. 486. All italics in the brief are petitioners'.

the Government over competitive land grant mileage, or it does not receive the business. Petitioners do not operate in Southwestern rate territory, and the respondents do not operate in Central Territory. The two sets of lines interchange the freight at the boundary of the two rate territories, at such points as St. Louis and Cairo, on the Mississippi River.

For many years each of these roads has had a separate, individual land grant equalization agreement with the Government. The Court of Appeals apparently quotes with approval (R. 1796; 155 F. 2d 767, 771) the following statement in the opinion of the District Court:

> "Land grant agreements are contracts between the individual carrier and the Government. They are purely voluntary and subject to such terms only as the contracting parties agree upon. Plaintiffs have no lawful right to control in any manner defendants' land grant agreements with the Government. Defendants have no lawful right to control in any manner plaintiffs' land grant agreements with the Government. They are subject to cancellation by the parties to them without interference from any other carrier." (R. 1675; 59 F. Supp. 21, 23.)

There has never been an agreement between petitioners and respondents respecting the ownership or distribution of land grant revenues. Until the filing of the complaint herein, it had always been recognized by all the parties to this cause that the revenue to be received by each road was governed solely by the terms of that road's individual equalization agreement with the Government. The dispute arose over the construction of the several agreements. The District Court found:

> "For over thirty years each of the parties to this case, regardless of which were the collecting or settling carrier, carried the land grant deduction in the territory served by it. In 1934 the defendants made some

> changes in their land grant agreements with the Government. *Basing its action on these changes in land grant agreements by the defendants with the Government,* two of the plaintiffs (Missouri Pacific Lines and St. Louis Southwestern Railway) thereupon commenced to pass on to the eastern lines part of the land grant deductions made on the western lines, in cases where they were the collecting carrier."[1] (R. 1664; 159 F. Supp. 21, 25.)

It will be seen that the very origin of this controversy emphasizes respondents' reliance upon the terms of the equalization agreements as governing the ownership of the revenue derived from such agreements. (R. 238, 239, 242.) The District Court found further that respondents continued to justify their position in the dispute neither on the ground of a contract between the roads themselves, nor on the absence of such a contract, "but on the land grant agreement of the defendants [petitioners]." (R. 1698; 59 F. Supp. 21, 42.)

The several equalization agreements between petitioners and the Government plainly limit the land grant deductions equalized by each of them, to the deductions arising out of land grant mileage in Central rate territory in which those lines operate, the territory lying east and north of the gateways where the freight is interchanged between petitioner and respondent lines. The limiting provision, common to each of the petitioners' equalization agreements, is as follows:

> "The participation of this carrier in rates derived through land-grant deductions is subject to the limitation that this carrier will participate only in deductions for the land-grant mileages within Central Freight Association territory of the lines of railroad

[1] When Government freight is transported over more than one line, the Government, for convenience, sends the aggregate amount of the charges accruing under the several equalization agreements, to the terminating road, which has the duty to remit, on the proper basis, to all roads participating in the transportation.

in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive." (Ex. D-2, par. 3(c), R. 1252; Ex. E-2, par. 3(d), R. 1255; Ex. F-2, par. 3(d), R. 1259.)[1]

A few weeks before the bringing of this suit counsel for one of the respondents conceived the idea of attempting to defeat that provision by contending that the respective traffic officers of the two groups of roads had entered into a contract to distribute the revenue from Government freight on the same basis as the revenue accruing from joint rates, and without regard to the location or amount of the land grant mileage in the respective rate territory, or the terms and conditions of the several equalization agreements. It was contended that the alleged contract between the parties overrode and nullified the limiting terms of petitioners' individual equalization agreements with the Government, and required petitioners to bear, not only all the land grant deductions in their own (Central) rate territory, but also to bear a part of the deductions arising out of land grant mileage in Southwestern Territory which is competitive with respondents. The District Court said:

> "Specifically it is this transfer, from west to east, of land grant deductions that is the crux of this case." (R. 1665; 59 F. Supp. 21, 26.)

By their answer, petitioners denied the making of the alleged contract, and asked the Court to resolve the controversy by requiring that in the distribution of the revenues the respondent roads observe the equalization agreements as they had done for thirty years, and as they claimed they were doing for forty years, the entire

[1] For convenient reference, the presently effective equalization agreements of The Baltimore and Ohio Railroad Company, and of the Missouri Pacific Railroad Company, which are typical, respectively, of those of petitioners and respondents, are attached to the supporting brief as Appendix A.

life span of such agreements. The existence or nonexistence of the alleged contract between the roads was the sole issue in the District Court because it was the sole ground on which respondents sought to defend their action in forcing petitioners to bear deductions in addition to those specified in their equalization agreements. In an extensive opinion based on evidence taken at a long trial, including the testimony of many witnesses, the trial court held that the alleged contract by which respondents sought to defeat the terms of the equalization agreements had never been made, and required that the revenues be distributed in accordance with the terms of the several equalization agreements, namely on the basis of each road bearing the deductions accruing in its own territory.

It was not disputed, and the District Court found, that for the transportation of the freight across Central Territory the Government regularly pays to the settling road the amount which would be paid for that service by the public at large, reduced only by the land grant deductions in Central Territory, and similarly, that for the transportation through Southwestern Territory, the Government pays the settling road the amount which would be paid for that service by the public at large, reduced only by the land grant deductions in Southwestern Territory. (R. 1677, 1678; 59 F. Supp. 21, 32-33.)

The District Court held:

> "There is no provision in [petitioners'] defendants' land grant agreements which, on their face, can be construed as a contractual obligation by the defendants to absorb land grant deductions in the territory of the [respondents] plaintiffs or by which land grant rates are converted into joint rates." (R. 1673; 59 F. Supp. 21, 30.)

He stated that respondents and all other roads had recognized this for many years, and that other Southwestern

lines continue to do so now. He held that under the terms of the equalization agreements the sums paid by the Government do not become a joint fund of common ownership in the hands of the settling road to be allocated by agreement between the roads. He held, on the contrary, after reviewing the whole history of equalization agreements, that they are *several* and individual, (R. 1663, 1664) that each road fixes the measure of the compensation it will receive by a general holding out in its agreement, as qualified by various "exceptions" and "conditions," and that the several sums, due the respective roads, "are lumped together in one sum and the revenue sent to the destination or collecting carrier for distribution." (R. 1678.) He held, therefore, that the ownership of the revenue paid by the Government is established by the several equalization agreements and must be distributed accordingly. The District Court thus disposed of the entire controversy.

The Judgment of the Court of Appeals.

The Court of Appeals sustained the holding of the District Court that when the traffic officers of the two groups of roads formulated a statement of the divisions of joint rates which had been prescribed by the Interstate Commerce Commission, they had not thereby made a contract governing the ownership and distribution of revenues accruing under equalization agreements. The Court of Appeals said:

> "These findings support the decree denying the relief demanded by the plaintiffs [respondents] and they are abundantly sustained by the evidence. The testimony is voluminous. To review it here would unduly extend this opinion. Further, such a review is unnecessary because the trial court has set it out at length in its opinion." (R. 1794; 155 F. 2d 767, 771.)

Further, the Court of Appeals agreed that:

> "These contracts [land grant equalization agreements] are entered into voluntarily by the railroads;

> and they may, in so far as the government is concerned, contain such conditions, restrictions and limitations as the railroads filing them desire to impose." (R. 1791; 155 F. 2d 767, 769.)

Nevertheless, the Court of Appeals denied any effect to the "conditions, restrictions and limitations" in petitioners' equalization agreements, holding that the District Court "exceeded its jurisdiction" (R. 1795) in requiring that the terms of the equalization agreements be observed, and thus resolving the entire controversy. The court said:

> "Clearly, it seems to us, the Agreement [petitioners' equalization] read as a whole means that defendants [petitioners] will accept and receive shipments for the government *at the lowest net rates available, but that for through traffic over connecting lines from or to points outside of Central Freight Association Territory they will divide the revenues only on the territorial basis.*"[1] (R. 1798; 155 F. 2d 767, 772.)

The statement last quoted reveals, we believe, the basic error of the Court of Appeals. The very provision[2] which is the heart of petitioners' equalization agreements because it identifies the land grant deductions which petitioner will "equalize", or allow to the Government, would be rendered utterly ineffectual and meaningless by that court's modification of the District Court's decree:

> (1) This vital "exception"[2] is given no effect so far as the Government is concerned. Its plain purpose and meaning is to limit and qualify the equalizing road's holding out to carry at "the lowest net rates

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[1] For convenience the term "territorial basis" was used throughout the case to mean a distribution of the sums paid by the Government under the equalization agreements on the basis of each line bearing the deductions in its own territory.

[2] "*The participation of this carrier* in rates derived through land-grant deductions *is subject to the limitation* that this carrier will participate only in deductions for the land-grant mileages within Central Freight Association territory of the lines of railroad in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive." (Ex. D-2, par. 3(c), R. 1252; Ex. E-2, par. 3(d), R. 1255; Ex. F-2, par. 3(d), R. 1259.)

lawfully available." But in spite of the exception, it is said that the petitioners agreed with the Government to handle the traffic "*at the lowest rates available.*"

(2) The provision is held meaningless, also, so far as connecting railroads are concerned because it is characterized as a "divisional formula" which one carrier cannot make "binding upon another carrier without the other carrier's consent." (R. 1796; 155 F. 2d 767, 772.)

The "exceptions" and "conditions" which have been used by every equalizing carrier from the beginning to limit and define what is equalized, and thereby to measure the reduced charge accorded the Government, are thus rendered completely ineffectual for any purpose.

The Court of Appeals concluded:

"The decree makes this divisional formula binding upon the plaintiffs who are not parties to it." (R. 1798; 155 F. 2d 767, 772.)

• • • • •

"While we conclude that the court rightly denied to the plaintiffs the relief demanded in their petition, we are also of the opinion that it exceeded its jurisdiction in granting to the defendants the injunctive relief demanded by them." (R. 1795; 155 F. 2d 767, 771.)

The judgment of the Court of Appeals that the District Court was without power to determine this controversy was based upon the belief, which we believe to be erroneous, that the principle stated by this Court in *The Terminal R. R. Association case, infra,* controls the issue here. Although it held that reduced charges accorded the Government through individual equalization agreements are not joint rates, but are of an entirely different character, the Court of Appeals said:

"In *Terminal R. R. Association, et al.* v. *United States, et al.,* 266 U. S. 17, 30, the Supreme Court

said: 'The making of rates is a legislative and not a judicial function (citations). The division of *joint rates is also legislative in character.*' " (R. 1795; 155 F. 2d 767, 771.)

• • • • •

"Neither can one carrier by inserting conditions and restrictions in its equalizing land grant contract with the government make such restrictions binding upon another carrier without the other carrier's consent." (R. 1796; 155 F. 2d 767, 772.)

• • • • •

"Divisions of land grant rates to be earned in the future can be settled only by contract between the participating carriers. Division of revenues so earned in the past can be settled only by agreement or by a proper suit in equity." (R. 1798; 155 F. 2d 767, 772.)

Both sides asked the District Court to resolve this controversy by granting declaratory and injunctive relief, and all the evidence germane to the issue was offered and received. Respondents' contention was that the equalization agreements were no longer controlling because of an alleged contract between the roads establishing the ownership of the revenues on a different basis; petitioners contended that no such contract had been made and that the equalization agreements still governed the ownership and distribution of the revenue.

The District Court found, and the Court of Appeals agreed, that the evidence proved that the contract alleged by respondents had not been made. Further, the evidence proved without dispute, as stated in the opinion of the District Court, that for more than a generation both these groups of carriers had recognized that their respective equalization agreements governed the settlements between them, and that the agreements did not require either group of roads to bear deductions accruing

in the territory of the other group. (R. 1664; 59 F. Supp. 21, 25.) The evidence proved that the equalization agreement of every road is in such terms, and so qualified, that an agreement carrier never absorbs any land grant deductions without its full and complete consent, and that it is unnecessary for two or more equalizing carriers to enter into a further agreement between themselves in regard to the allocation of such deductions. The evidence proved that by the terms of their respective equalization agreements each of the respondent roads has agreed with the Government to accept the sums which are left in its hands after settling with the Central roads on the basis required by the decree of the District Court; it proved that the sums thus remaining to the respondent roads constitute the full amount paid by the public at large for the transportation service over those lines, reduced only by land grant deductions in their own territory. The evidence proved that at the suggestion of the Government each of the respondents amended its own equalization agreement with the Government in response to, and contemporaneously with, the making of petitioners' equalization agreements with the Government. (R. 124-129; 292-294; 350-355.)

Without discussion, and apparently without any consideration of this evidence, and presumably on the theory that as a matter of law the equalization agreements create a common fund of undivided ownership, the Court of Appeals vacated the action of the District Court resolving the entire controversy and remitted the parties to a "proper suit in equity." (R. 1798.)

Basis of Jurisdiction.

The decree of the Circuit Court of Appeals sought to be reviewed was entered on June 10, 1946. Petitioners' motion for reconsideration was denied July 26, 1946, one judge voting to grant the motion. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347). There are special and important reasons, as set forth in this petition, why the cause should be reviewed by this Court.

Questions Presented.

1. Does the United States District Court have jurisdiction to grant injunctive relief in an action based upon the Federal Declaratory Judgments Act, Judicial Code, Section 274(d), 28 U.S.C. Section 400, when necessary to put an end to the controversy in one proceeding, rather than to require the parties to bring two or more actions involving the same subject matter and governed by the same evidence?

2. Do the several land grant equalization agreements between petitioners and the United States govern the revenue to be received by each road participating in the transportation of the freight, or are petitioners obliged to negotiate an agreement with respondents before they can secure the amounts actually paid by the United States for the respective transportation services performed by them?

3. Is the distribution of the land grant revenue which accrues under the several, separate equalization agreements between the individual roads and the United States, governed by the terms of such several agreements, with the result that the terminating or settling road receives

certain specific sums which are owned by its connecting roads, and not a single fund of common ownership in which all participating roads have an undivided interest?

4. Does the mere form or method of settling for the transportation of Government freight under which the net amounts due the several roads "are lumped together in one sum and the revenue sent to the destination or collecting carrier for distribution," (Opinion of the District Court, R. 1678) convert the several separate increments so paid by the Government into a fund of common ownership in which each participating line has an undivided interest?

5. After apparently recognizing that each road has the right to agree with the Government as to the reduced rate basis on which that road will handle land grant traffic, did the Court of Appeals then erroneously nullify that conclusion by ruling that when the Government pays the charges due under each of the several equalization agreements, petitioners may obtain the revenue so earned, and paid by the Government, only through the consent of the terminating line, and that the District Court was without jurisdiction to resolve the controversy by declaring that the terms of the several agreements governed and must be observed in the distribution of the revenue?

6. Did the United States District Court have the jurisdiction and the power, if not the duty, to construe and determine the effect of the individual equalization agreements of the petitioners and respondents and to require by means of declaratory and injunctive relief that such agreements be observed?

7. Did the Court of Appeals err in vacating such declaratory and injunctive relief on the ground that it was beyond the jurisdiction of the District Court, without any consideration of undisputed evidence showing that for

forty years respondents had recognized and insisted that the distribution of land grant revenues is governed by the terms of the several equalization agreements, and, because of this, that by agreement with the Government each of the respondents had deliberately amended its own equalization agreement in response to and contemporaneously with the making of petitioners' equalization agreements?

8. In vacating the decree of the District Court which directed each of the respondents to observe the terms of the several equalization agreements in the distribution of revenues derived from such agreements, and holding that in order to secure the compensation provided in its equalization agreements the Central roads must secure the consent of respondents, did the Court of Appeals err by denying to each of the petitioners its right, under Section 22 of the Interstate Commerce Act (49 U.S.C. Sec. 22), to determine for itself the measure of the reduced charge it would accord the Government?

Reasons Relied On for the Allowance of the Writ.

1. This is the first case presenting a controversy between connecting railroads over the ownership and distribution of sums paid by the Government for the transportation of freight under land grant equalization agreements, and by its decision therein the Court of Appeals has passed on an important question of Federal law which has not been, but should be, determined by this Court.

2. In vacating the order of the District Court which held that the terms of the several equalization agreements governed the ownership of the revenue accruing under such agreements, and that those agreements must be observed by the settling road in the distribution of such revenues, the Court of Appeals denied the right of each of petitioners under Section 22 of the Interstate Commerce

Act (49 U.S.C. Sec. 22) to determine the measure of the reduced charges which it would accord the Government on land grant freight traffic. This involves an important question of Federal law which has not been, but should be, settled by this Court.

3. In setting aside the decree entered by the District Court on authority of the decision of this Court in *Terminal R. R. Association, et al.* v. *United States, et al.*, 266 U. S. 17, 30, the Court of Appeals has misconstrued and misapplied that decision.

4. The evidence of record proves, as the District Court found, that:

(a) there has never been an agreement between these roads overriding the equalization agreements and providing a basis for the allocation of revenues accruing under such agreements;

(b) for forty years every road, party to this cause, recognized that the revenue to be received by each road for the handling of Government freight under an equalization agreement is governed, not by an agreement between the several roads participating in the transportation, but solely by that road's individual equalization agreement with the Government;

(c) the equalization agreement of each of these roads is in such terms, and so qualified by conditions and exceptions, that it never absorbs any land grant deductions, or otherwise suffers a diminution of its revenue on this traffic without its full and complete consent;

(d) each of the respondents amended its own equalization agreement with the Government in response to and contemporaneously with the making of petitioners' agreements with the Government.

The opinion of the Court of Appeals does not contain the slightest reference to any of the evidence referred to in

paragraphs (b), (c) and (d) above, and it is apparent that it was given no consideration. It is submitted that the evidence sustains the decree of the District Court finally disposing of this controversy, and that the order setting aside the declaratory and injunctive relief granted petitioners creates such a gross injustice, and is so mistaken in law, as to require the exercise of the supervisory power of this Court.

5. In holding that the District Court was without jurisdiction to end this controversy by granting injunctive relief, and that petitioners must now resort to a suit in equity, despite the fact that the record presents every fact bearing on the issue which either side could adduce in any proceeding, the Court of Appeals decided a question respecting the administration of the Federal Declaratory Judgments Act (Judicial Code, Sec. 274d; 28 U.S.C. Sec. 400), which has not been, but should be, settled by this Court.

6. One of the judges of the Court of Appeals voted to grant petitioners' motion to reconsider that court's action in vacating the declaratory and injunctive relief granted petitioners by the District Court, so that there is some basis for suggesting that the four judges who have participated in the proceeding may be evenly divided on that question.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this Court for its review and determination on a day certain to be therein named, the full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 13129—Civil, *Guy A. Thompson, Trustee, Missouri*

Pacific Railroad Company, Debtor; Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, Debtor; and Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Debtor, Appellants v. *The Baltimore and Ohio Railroad Company, a corporation; The New York Central Railroad Company, a corporation; and The Pennsylvania Railroad Company, a corporation, Appellees*, and that said decree of said Circuit Court of Appeals in said case may be modified and reversed by this Court in such respects as the rights of petitioners may require, and that your petitioners may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with the law.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
a corporation,

THE NEW YORK CENTRAL RAILROAD COMPANY,
a corporation,

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation,

By DOUGLAS F. SMITH,
KENNETH F. BURGESS,
ROBERT A. SPRECHER,
WILTON D. CHAPMAN,
E. C. HARTMAN.

Of Counsel:

E. H. BURGESS,
THOMAS P. HEALY,
GUERNSEY ORCUTT,
SIDLEY, AUSTIN, BURGESS & HARPER.

Dated: September 1, 1946.

IN THE

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THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION; THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION; AND THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION,
Petitioners,

vs.

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR; FRANK A. THOMPSON, TRUSTEE, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR; AND BERRYMAN HENWOOD, TRUSTEE, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEBTOR,
Respondents.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI.

The Opinions in the Courts Below.

The opinion of the District Court is reported in 59 F. Supp. 21-49, and appears in the record herein at pages 1659-1731.

The opinion in the Circuit Court of Appeals is reported in 155 F. 2d 767, and appears in the record herein at pages 1788 to 1798.

Petitioners' motion for reconsideration was denied July 26, 1946, one judge voting to grant the motion.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 10, 1946. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code, as amended (28 U.S.C. Sec. 347).

STATEMENT OF THE CASE.

Petitioners and respondents do not operate in the same territory. They connect and interchange traffic at the Mississippi River. Each has a land grant equalization agreement with the Government. The function of such an agreement is to reduce the charge of the agreeing road in such an amount as to make it "equal" to the charge available to the Government over the land grant mileage with which the equalizing road desires to compete. Respondents admit, and the trial court found, that for thirty years all of the parties interpreted the several equalizing agreements to require petitioners to bear the land grant deductions in Central Territory, and respondents to bear the land grant deductions in Southwestern Territory. (R. 1664.)

This controversy arose out of respondents' action in forcing the Central roads to bear, not only all land grant deductions arising out of the land grant mileage in their own (Central) territory, which petitioners should and do bear, but to bear also a part of the deductions accruing out of land grant mileage located in Southwestern Territory. The District Court described respondents' effort to shift a part of their own competitive land grant burden from the Southwest into Central Territory by transferring it to petitioners, as the crux of the case. (R. 1665; 59 F. Supp. 21, 26.)

When respondents first departed from the long practice of bearing all the deductions in their own territory they claimed to rely upon an alleged change in the meaning of petitioners' equalization agreements. Throughout the period of the dispute, it was the position of all parties that the equalization agreements controlled the settlements,

and the parties differed only in their interpretation of the agreements. To remove any possible basis for this difference, petitioners cancelled their agreements and entered into new agreements with the Government effective January 1, 1944.[1] The language of these agreements stating the deductions equalized by petitioners is too plain to permit any pretense of misconstruction, and a few weeks before this action was commenced respondents sought some means to override the equalization agreements which they had always previously relied upon as controlling the ownership and distribution of the revenue. It was then that counsel for one of the respondents asserted for the first time that several years before, the traffic officers of the two groups of roads had entered into a contract to allocate land grant revenues on the same basis as that prescribed by the Interstate Commerce Commission for the division of "joint rates."[2]

The District Court held that the alleged contract had not been made, and that finding removed the only ground on

[1] The District Court held that the Central roads' 1944 agreements actually had the same meaning as those previously in effect and respondents did not challenge that conclusion in the Circuit Court of Appeals. (Conclusion of Law No. 9, R. 1730; Respondents' points on appeal, R. 1743-1748.)

[2] The Commission, acting under Section 15(6) of the Interstate Commerce Act (49 U.S.C. Sec. 15) prescribed the basis for the division of "joint rates" applying between Central and Southwestern Territories. Both courts below held, and respondents do not contend otherwise, that the "joint rates" which were before the Commission in that proceeding, are the rates applicable on commercial traffic published in the tariffs filed with the Commission and either prescribed by the Commission or made by agreement between the participating roads pursuant to formal "concurrences" filed with the Commission. Both courts below held that charges on Government freight derived through the equalization of land grant deductions are not joint rates, that the Commission had no power or purpose to "divide" the revenue here involved under Section 15(6) of the Act, or otherwise, and had no knowledge of the existence of this controversy or any facts relating thereto.

which respondents had argued that the equalization agreements no longer controlled the ownership and distribution of the revenue. The court then declared the meaning and effect of the equalization agreements, and decreed that they be observed by the settling road in the distribution of the revenue.

The Court of Appeals sustained the District Court in holding that the contract alleged by respondents in an effort to defeat the equalization agreements, had not been made, but denied the jurisdiction of that court to declare the respective rights of the parties in the sums received by the settling road as determined by the several equalization agreements. The Court of Appeals held that petitioners' claim for a distribution of revenue in harmony with the terms of those agreements must be permitted to accrue and made the subject of a "proper suit in equity." (R. 1798; 155 F. 2d, 767, 773.)

Because it was admitted by respondents that the historic practice under the equalization agreements was for each group of roads to bear the competitive deductions in its own rate territory, and because respondents' effort to depart from that practice rested solely on their contention that the parties had entered into a contract establishing a different basis of settlement, the existence or nonexistence of that contract was the issue briefed and argued in the Court of Appeals. The opinion of that court shows that in remitting petitioners to a different proceeding and another court, it did not have in mind the evidence and the considerations which caused the District Court to resolve the entire controversy in this proceeding. Petitioners brought these matters to the attention of the court in a motion for reconsideration which was denied, one judge voting that it be granted. (R. 1867.)

For a full and accurate statement of the facts of the case

we respectfully refer this honorable Court to the opinion of the District Court. (59 F. Supp. 21-49; R. 1659-1731.) Respondents have not questioned a single statement of fact in that exhaustive opinion.

Specification of Errors.

1. The Circuit Court of Appeals denied the right of an equalizing road to determine for itself, through an agreement with the Government, the measure of the reduced charge for which it will transport land grant freight, by holding that the equalizing road can obtain such compensation only by the consent of the settling road which has physical possession of the revenue.

2. The Circuit Court of Appeals misconstrued and misapplied the decision of this Court in *Terminal R. R. Association, et al.* v. *United States, et al.*, 266 U. S. 17, 30.

3. The Circuit Court of Appeals misunderstood and misconstrued the function and the effect of the equalization agreements.

4. The Circuit Court of Appeals ignored the evidence which proves, as the District Court found, that the several equalization agreements govern the ownership and distribution of the revenue which comes into the hands of the respondents as the settling road.

5. The judgment of the Circuit Court of Appeals would defeat petitioners' right under Section 22 of the Interstate Commerce Act (49 U.S.C. Sec. 22) to fix the measure of the reduced charge for which it is willing to transport Government freight.

6. The Circuit Court of Appeals erred in holding that the District Court lacked jurisdiction under the Federal Declaratory Judgments Act to resolve this controversy, and that the parties must now be remitted to further liti-

gation in equity, notwithstanding the fact that both sides asked for a declaratory judgment, and as the basis for a complete determination of the controversy placed in evidence every fact which either side could possibly adduce in this or any other proceeding.

ARGUMENT.

The Fundamental Error of the Court of Appeals Arose Out of Its Belief That the Settling Road Had by Some Means Acquired an Undivided Property Interest in the Revenue Paid by the Government for the Transportation of the Freight Across Central Territory Pursuant to the Several Equalization Agreements Between Petitioners and the Government.

The Court of Appeals treated the revenue which is received for distribution by the settling road as a fund of common ownership, notwithstanding the fact that that road receives the revenue, not through any arrangement or understanding between the roads themselves, because there is no privity between the roads in respect to these transactions, but only because the Government finds it convenient to remit to the terminating road, for distribution, the charges created by the several equalization agreements.

The Court of Appeals sustained the District Court in holding that the charges paid by the Government on land grant traffic do not constitute "joint rates" as that term is used in the Interstate Commerce Act, and in Division Sheet 200-A, alleged by respondents to be a contract governing the ownership of revenues derived from equalization agreements. Nevertheless, that court has held that to "divide" net land grant rates is a legislative function, and in support of that conclusion has relied upon the statement in the *Terminal Railroad Case*, 266 U. S. 17, 30, in which the Supreme Court states:

"The making of rates is a legislative and not a

judicial function. The division of *joint rates* is also legislative in character."

In the paragraph immediately preceding the statement quoted from the *Terminal Case, supra,* (page 30) the Supreme Court said:

> "All rates have been set forth by tariffs; and the divisions of the charges among the participating carriers have been shown *by their division sheets filed with the Interstate Commerce Commission.*"

The rates involved in that case, as the opinion of the Supreme Court states, were joint rates available to the public at large, created by joint action of the carriers and filed as joint rates with the Commission.[1] They were not net rates on Government freight, derived through equalization agreements.

Following its reference to that decision, and in reliance upon it, the Court of Appeals said:

> "The Interstate Commerce Commission is authorized to establish through routes and to fix joint commercial rates and to fix divisions of such rates among carriers. 49 U. S. C. A. § 15(1), (3), (6). But the Congress has not delegated either to the Commission or to the courts power to fix divisions of net land grant rates over equalizing routes. Such divisions can be fixed only by contracts among the participating carriers. These divisions can not be determined by reference to any order of the Commission or of the

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[1] In compliance with paragraph 6 of Section 6 of the Interstate Commerce Act, the Interstate Commerce Commission has formulated its tariff Circular 20-A entitled "Rules to Govern the Construction and Filing of Freight-Rate Publications" (Exhibit W-1, R. 1120-1218 and latest supplement, Exhibit X-1, R. 1219-1236), in which the Commission defines joint rates and joint tariffs as follows:

> "The term 'joint rate,' as used herein, is construed to mean a rate that extends over the lines of two or more carriers and that *is made by arrangement or agreement between such carriers and evidenced by concurrence or power of attorney.*
>
> " 'Joint tariffs' are those which contain 'joint rates.' " (R. 1121.)

> War Department or of the court; and it is conceded by the parties and it was recognized by the court that equalizing, or land grant, agreements do not include contracts between the carriers." (R. 1795-96; 155 F. 2d, 767, 771.)

It is clear that the Court of Appeals did not speak of "dividing" the revenue involved here, merely in the sense of "remitting" or "distributing" the revenue. On the contrary, it spoke of fixing divisions of this revenue as if, and on the theory that, the revenue which is received by the terminal road is a common fund, in every dollar of which, each road has an undivided interest.

There is a fundamental difference between the conditions, and the obligations, under which the terminating line collects and holds the revenue accruing, on the one hand, from "joint rates" applying on commercial traffic and, on the other hand, the revenues accruing under separate equalization agreements in which, and by which, each road has made its own individual arrangement with the Government. Without the benefit of argument or reference to much cognate evidence on the point, the court simply assumed that the same principle applies to these very different transactions. The whole relationship between the carriers and the obligation of the collecting line in the two situations, are entirely unlike, and the application of the principle governing the distribution of revenue accruing from "joint rates" would create a gross miscarriage of justice if applied to land grant revenue.

Originally the Government paid the commercial rate and then made claim upon the respective carriers for the amounts due under the statute or the equalization agreements. In the early equalization agreements it was provided:

> "• • • , that freight under Government bills of

> lading will continue to be way-billed at published rates, but in the final adjustment of accounts, the basis outlined above will be observed." (Exhibits M-1, N-1, P-1, Q-1; R. 1059-1063.)

For convenience the Government now makes settlements in one transaction by paying the freight bill to the delivering carrier. In 18 Comp. Dec. 585, the Comptroller commented upon the present method of payment as follows:

> "In making payment for the said service the proper deductions are made therefrom, whether payment is made directly to the aided line or to a connecting carrier which necessarily receives for the aided line a less sum than its authorized division on commercial business.
>
> "Reduced rates on Government business applying by the land-grant lines would lead to those lines being generally used therefor. Many other roads desiring to participate in the Government business have offered to accept for service over their lines the same net revenue as accrues to land-grant lines. *Such roads are called 'agreement' roads, and payment for services rendered by them are made the same as though the reductions are required by law.*" (p. 586.)

We cannot too strongly emphasize the fact that the basis of the injunction entered by the District Court upon a full consideration and understanding of the evidence before him is that *the sums paid under the individual equalization agreements do not constitute a common or joint fund in which the several carriers have an undivided interest.* On the contrary, and this is the vital point, it is solely by virtue of the mechanical process by which land grant charges are sent to the delivering road for distribution that each of the respondents, in its capacity as the settling road on certain shipments, comes into possession of several identifiable sums of money which belong to the Central roads under the terms of their several respective

agreements with the Government. These several sums represent the amount which the "public at large" would pay for handling the traffic across Central Territory reduced by the land grant deductions which the Central roads have agreed to bear.

We shall endeavor to show that the evidence sustains this construction of the legal effect of the several equalization agreements, and if it does, then clearly there is no common and jointly owned fund to be divided, and, under the Court of Appeals' opinion, no jurisdictional question exists. For the very reason that land grant rates are not "joint rates," as both courts below held, the principles governing the division of revenue derived from "joint rates" are inapplicable, and the District Court had jurisdiction to hold, as it did, that the respondent roads are currently receiving sums from the Government in compensation for the transportation of land grant traffic which belong to, and are received and held in trust for, the Central roads, and the decree of the District Court was that such monies must be paid over to the owner roads as received.

The Ownership of the Sums Paid by the Government Under the Terms of the Carriers' Several Equalization Agreements Is Governed by the Terms of Those Agreements, and This Was Recognized by the Respondents for Forty Years.

BY THE USE OF "EXCEPTIONS" AND "CONDITIONS" INCORPORATED IN ITS EQUALIZATION AGREEMENT EACH NON-LAND GRANT ROAD HAS PLACED WHATEVER LIMITATION IT HAS DESIRED UPON THE DEDUCTIONS BORNE BY IT, AND EXACTLY BY THAT MEANS HAS FIXED THE MEASURE OF THE REDUCED RATE ACCORDED THE GOVERNMENT.

The Court of Appeals modified the decree by eliminating therefrom the declaratory and injunctive relief granted the petitioners, on the ground that "divisions of net land grant rates * * * can be fixed only by contracts among the participating carriers" and, therefore, that one carrier cannot, "by inserting conditions and restrictions in its equalizing land grant contract with the Government make such restrictions binding upon another carrier *without the other carrier's consent.*" (R. 1795-96; 155 F. 2d 767, 771.)

In its opinion the Court of Appeals also states that equalization agreements "are entered into voluntarily by the railroads, and they may, in so far as the Government is concerned, contain such conditions, restrictions and limitations as the railroads filing them desire to impose." While referring to the "conditions, restrictions and limitations" which each road inserts in its individual equalization agreement, the Court of Appeals seemingly did not perceive that the very practical function of such provisions is to consent to, and fix the amount of, the reduced charge which the equalizing road is to receive for its service.

The several land grant equalization agreements of these roads are drawn in such form that each road protects its own revenues by the conditions and exceptions incorporated

in its own equalization agreement, and there is no occasion for an agreement between the roads. The necessary consents of the individual roads are embodied in the several equalization agreements and that is the principle underlying the District Court's decree. The Court will be asked to observe how forcefully this fact is illustrated by the amendments which each of the three respondents made in its own equalization agreement, contemporaneously with and in response to the making of the petitioners' agreements. (R. 124-129; 292-294; 350-355.)

By the terms of the equalization agreements, entered into individually with the United States Government by each of the six roads, parties to this cause, the carrier agrees, "*subject to the conditions and exceptions stated below,* to accept, for the transportation of property shipped for account of the Government * * * the lowest net rates lawfully available, as derived through deductions account of land-grant distance from lawful rates * * * applying from point of origin to destination at time of movement." As stated, that holding out is expressly qualified by numerous "conditions and exceptions". (R. 1251, R. 1254, R. 1257, R. 121, R. 289, R. 347.)

Petitioners' respective agreements are subject to two conditions, consideration of which is vital to an understanding of this case because both conditions apply to traffic "destined to and/or received from points on lines of other carriers"—the fact situation involved in this case. The first of these conditions which appears in the agreement of each of the six roads, reads as follows:

> "a. On traffic destined to and/or received from points on lines of other carriers this agreement will apply only in connection with such carriers as have an agreement of the form stated in paragraph 1 above on file with the Chief of Transportation, War Depart-

ment, Washington, D. C., except as otherwise provided under the heading of 'Exceptions' in paragraph 3 below."[1]

Condition "a" means that an equalization carrier will accept "the lowest net rates * * * applying from point of origin to destination at time of movement" *only* if the traffic is local and handled by it alone. If the traffic is handled by two or more carriers, then condition "a" becomes operative and the equalizing carrier will accept the "lowest net rates" only on the condition that every other carrier participating in the transportation *also* enters into an equalization agreement with the Government fixing the revenue which that connecting road shall receive for the service. Each of the roads here did file such an agreement and incorporated such conditions and exceptions as that road desired to determine and to protect its own revenue.

One of the exceptions incorporated in the equalization agreement of each of the petitioners, is the provision that the carriers' holding out to participate in the transportation of land grant traffic, "is subject to the limitation" that it will only bear deductions arising out of land grant mileage in Central Territory:

> "(c) The participation of this carrier in rates derived through land-grant deductions is subject to the limitation that this carrier will participate only in deductions for the land-grant mileages wthin Central Freight Association territory of the lines of railroad in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive." (R. 1252, 1255, 1259.)

Under that agreement a reduced charge became available to the Government over non-land grant mileage through

[1] B. & O. (R. 1251), N. Y. C. (R. 1254), Penn. (R. 1257), Frisco (R. 121), M. P. (R. 347), St. L. S. W. (R. 289).

Central Territory, only upon the express condition that that provision be observed. It is not disputed that on every shipment the Government does actually pay over to the settling road for the transportation service through Central Territory, the full amount which would be paid for that service by the public at large, reduced only by the land grant deductions accruing in Central Territory.[1]

Each of respondents amended its own equalization agreement with the Government, contemporaneously with, and in response to, the incorporation of the foregoing provision in petitioners' several equalization agreements. One of the conditions which had always been incorporated in the agreement of each of the respondent roads, until waived, as shown below, when the Central roads' present agreements became effective, is as follows:

> "b. On traffic destined to and/or received from points on lines of other carriers this agreement is subject also to the exceptions in the agreements of each individual carrier forming part of the through route of movement, on file with the Chief of Transportation,

[1] The District Court described this process as follows:

> "Under direction of the War Department in arriving at the land grant rate, the first step is to divide the through rate by the commercial division (now Joint Division Sheet No. 200-A) for the purpose of determining the amount of the through rate due the respective carriers. After this is done, on mandate of the War Department, the land grant deductions are made on account of the land grant mileage in the respective territory. Having thus arrived at the net rate after land grant deductions have been made, the respective balances or nets are lumped together in one sum and the revenue sent to the destination or collecting carrier for distribution to the carriers entitled thereto because of their part in the carriage of the Government shipment. This method of making land grant deductions in and of itself lends support to the defendants' method of making division of land grant rates on the territorial basis, * * *." (R. 1677-78; 59 F. Supp. 21, 32.)

War Department, Washington, D. C., *except as may be otherwise provided under the heading of 'Exceptions' in paragraph 3 below.''*

By modifying the application of standard provision "(b)", and by the use of other "exceptions" and "conditions" each equalizing road adjusts its own agreement so as to prevent any unacceptable shrinkage of its own revenue. By the use of this provision, a particular road may adopt as an exception to its own agreement, the exceptions of connecting roads, adding such other exceptions as it desires, so that in the end, and in effect, it authorizes only such deductions from its own revenue as it is willing to grant. When the War Department was notified in the Fall of 1943 that the Central roads were cancelling their existing equalization agreements and were proposing to grant reduced rates on Government freight only upon such terms that the respondents, as the settling roads, could no longer claim the agreements to be ambiguous, the Chief of Transportation advised all other equalizing carriers of the exception embodied in the proposed agreements tendered to the War Department by the Central roads. In a letter dated December 6, 1943, Colonel Williamson, of the Office of Chief of Transportation, said:

"Central Freight Association railroads have transmitted to this office new freight land-grant equalization agreements containing a new exception, as follows:

'The participation of this carrier in rates derived through land-grant deductions is subject to the limitation that this carrier will participate only in deductions for the land-grant mileages within Central Freight Association territory of the lines of railroad in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive.'

The Chesapeake and Ohio, the Norfolk and Western, and the Virginian included special variations of this exception apparently based on territorial considerations peculiar to those lines and not affecting the essence of the new exception for purposes of this letter.

• • • • •

"The standard freight land-grant equalization agreement filed by rail lines carries the following 'Condition (b)':

> '(b) On traffic destined to and/or received from points on lines of other carriers this agreement is subject also to the exceptions in the agreements of each individual carrier forming part of the through route of movement, on file with the Chief of Transportation, War Department, Washington, D. C., except as may be otherwise provided under the heading of "Exceptions" in paragraph 3 below.'

This condition serves, practically, as a safeguard of each line against ex parte action by another line which might affect the proportions of land-grant 'shrinkage' as among various lines in a joint route. Because of 'Condition (b)' the action of the Central Freight Association lines may require a change in the routing practices of this office, field establishments of the Army, and other Government departments shipping freight subject to land-grant deductions, *unless all other lines provide such assurances as will enable equalization to continue in effect in the same manner as heretofore.* It has been decided by this office to solicit these assurances uniformly from all equalizing carriers outside Central Freight Association territory, notwithstanding any special features of their agreements. Accordingly, the following question is asked of your line:

> Will your line waive the provisions of Condition (b) so far as they may concern exceptions restricting equalization in Central Freight Association territory, provided all agreement carriers

in the route of movement, other than Central Freight Association carriers, agree to waive those provisions similarly?

"In the interest of uniformity and conclusiveness, it is requested that your reply be signed by a responsible executive or traffic officer—*and that, if it is affirmative, it not be qualified.* In connection with carriers whose affirmative replies are received by 22 December 1943, the routing practices of the Government need not be disturbed. Replies should be addressed to the Chief of Transportation, War Department, The Pentagon, Washington 25, D. C., attention Traffic Control Division. Telegraphic replies should be confirmed by letter." (R. 124-126; 350-352.)

The attention of the Court is especially directed to the Government's reference above to Condition (b) as the standard condition incorporated in equalization agreements, which *"serves, practically, as a safeguard of each line against ex parte action by another line which might affect the proportions of land-grant 'shrinkage' as among various lines in a joint route."* Nothing could better emphasize the means which are available to every road within the framework of its own equalization agreement to fix the measure of its agreed reductions and thus protect its own revenue. It is precisely because each line controls the measure of the reduced rate accorded the Government by the terms of its own equalization agreement with the Government that there has never at any time been an agreement on the subject between these roads themselves.[1]

It will be noted that respondents were advised by the

[1] Even to this day there has never been a dispute between the Central roads, including the petitioners, and the other principal Southwestern roads over the ownership of the revenue on this traffic. No dispute exists, for example, between the Central roads and such Southwestern roads as the Santa Fe, the Rock Island, the Illinois Central and the Kansas City Southern. Each of these roads has always recognized that its equalization agreement required it to bear the deductions in its own territory.

War Department that if their reply was "affirmative" it must *"not be qualified."* Respondents were presented with the clear choice of removing from their several agreements a condition which might be construed as a limitation upon their agreement to bear all deductions in their own territory, or of refusing to agree, with the result that the freight would be routed by the Government over the routes of other principal roads operating through Southwestern Territory which had always recognized their duty to bear the land grant deductions accruing in that territory. By uniform replies to that communication each of the respondent roads answered Colonel Williamson's question in the affirmative, thus waiving condition "b" in their own agreements effective January 1, 1944, coincident with the effective date of the new agreements of the Central roads. Each of the respondents, after replying in the affirmative, and *"not by way of modification but by way of explanation"*, then stated that it was contending in the case at bar that the Central roads had entered into a contract with respondents establishing a different basis for the distribution of land grant revenue from that embodied in the respective equalization agreements (R. 128-129; 292-294; 353-355), a claim which has now been rejected both by the District Court and by the Circuit Court of Appeals. In short, the only qualification which respondents sought to place on their recognition of the restrictions fully spelled out in the new agreements, was that they wanted to test out in court in this case their reliance on an alleged contract between the roads as a means of defeating the new agreements. They have now done so; both courts below have held against them.

We submit that in this deliberate modification of respondents' equalization agreements, the Court will see the practical operation of the method by which each road

protects its own revenue under these agreements, and also ample evidence of the "consents" of respondents deemed necessary by the Court of Appeals.

It Was the Position of Respondents for Forty Years, as the District Court Held, That the Terms of the Land Grant Equalization Agreements Govern the Ownership of the Revenue Accruing Under the Agreements.

The decree of the District Court declaring that the terms of the several equalization agreements control the ownership of the revenues accruing under such agreements is exactly the position taken by all of the respondents from the time when such agreements first came into existence about 1904, until six weeks before this suit was begun when counsel for one of the roads conceived the idea of contending that the parties had entered into a contract governing the ownership of this revenue. Prior to that time the dispute had to do only with the construction to be placed upon the terms of the equalization agreements which were recognized to be controlling.

The District Court found that for thirty years each of respondents recognized that the several equalization agreements established the ownership of the revenue accruing under such agreements and that the agreements contemplated that each line should assume the deductions in its own territory. (R. 1664; 59 F. Supp. 21, 25.) Accordingly, each road faithfully settled on that basis. The respondent, St. Louis-San Francisco, continued to do so until late in the year 1942, a period of almost forty years. (Opinion of District Court, R. 1664; 59 F. Supp. 21, 25.) It should be understood, moreover, that when respondents departed from that basis of settlement, and began to settle on a basis which forced petitioners to bear part of the land grant deductions accruing in the southwest, respondents

continued to insist until the institution of this suit that the equalization agreements were controlling and that their action was warranted by a proper construction of the agreements. (Opinion of District Court, R. 1697-1698; 59 F. Supp. 21, 41-2; R. 238.)

Respondents repeatedly replied to petitioners' protests over the settlements being made by saying in substance "we are relying on the terms of your equalization agreements—if you do not like the basis on which we are settling you must change your agreements." (R. 1675, 1676, 1698, 1541, 1543, 1317.) This was the historic, practical construction of the equalization agreements by all of the parties and this undisputed fact sustains the decree of the District Court that the equalization agreements are intended to and do determine the ownership of the revenues accruing under the agreements, and that henceforth they must be observed by the settling road in the distribution of the revenue. The long practical construction of the agreements by the parties stands in direct opposition to the view of the Court of Appeals that there must be an agreement between the carriers establishing the ownership of the revenue. There has never been such a contract between these parties in the forty years that they have been engaged in the transportation of this freight.

THE METHOD BY WHICH THESE ROADS HAVE FIXED AND ADJUSTED THEIR REVENUE FROM LAND GRANT TRAFFIC IS NOT BY AGREEMENTS WITH OTHER ROADS PARTICIPATING IN THE TRANSPORTATION, BUT BY CHANGES IN THEIR INDIVIDUAL EQUALIZATION AGREEMENTS WITH THE GOVERNMENT.

It has been pointed out, first, that the structure and terms of the several equalization agreements are so designed as to enable each road to fix the measure of the compensation for which it is willing to handle Government

freight, and to establish the ownership of the net amounts which, as the District Court found, "are lumped together in one sum and the revenue sent to the destination or collecting carrier for distribution." (R. 1678.) Secondly, we have emphasized the fact that in practice that has been the position of each of these roads,—there has never been an agreement between them respecting the ownership of the funds, yet for a generation the revenues were distributed without dispute on the basis of the equalization agreements,—and that when a dispute arose it was because both sides, while insisting that the equalization agreements were controlling, differed as to their interpretation.

Third, the evidence shows that whenever in the past any road desired to change the measure of the compensation to be received by it from this freight it did so, not through any arrangement with other roads, but through a change in its equalization agreement with the Government.

Petitioners' Exhibits J-1 and K-1 (R. 1025-1034) show the changes which each of the respondent roads has made in its equalization agreements with the Government in recent years. It will be observed that each of those roads revised its exceptions some fifteen times in the short period covered by the exhibit, which goes back only to 1927. As late as 1939, each of the respondents filed new equalization agreements changing their conditions and exceptions. (R. 121-3, 289-291, 347-349.) They made no effort to enter into agreements with the Central roads respecting any of these changes because they knew that it was by the terms of their individual equalization agreements that they should fix the measure of their reduced charge, and that changes in their agreements would be controlling and given full effect in the settlements.

Each of the Central roads also changed its agreement many times. A large number of their agreements are em-

braced in this record. (R. 1059-1119, 1237-1259, 1266-1281.) The New York System lines alone "made no less, or filed no less than twelve new agreements with the Government during that period of approximately two years." (R. 701.)

It is clear, we suggest, that each of these roads would not have continued to make changes in its equalization agreements year after year, as it did, if the changes were not recognized to be controlling in the settlements. The ultimate purpose, and indeed the only purpose of every such change was to affect the amount which the Government would pay, and the equalizing road receive, for the service performed by it. How meaningless and how futile it would have been to make these repeated changes in the equalization agreements if in practice the changes did not control the revenue which each line would receive from the settling road, because in no instance were these changes accompanied by agreements between the Central and Southwestern roads themselves. There has never been an agreement between the Central and Southwestern roads of any character in respect to the allocation of land grant revenues, but only the consents embodied in the several equalization agreements and the established practice in respect thereto. We submit, therefore, that the long practice of settling on the basis of the several equalization agreements, as amended over and over again by the individual roads, is the clearest proof that those agreements have been recognized to control the distribution of the revenue, and that each equalizing line consents to the distribution of the revenue on the basis of the terms embodied in the several agreements.

The Decision of the Court of Appeals Erroneously Denies: (1) the Right of a Non-Land Grant Road to Determine for Itself the Measure of the Reduced Charge for Which It Will Transport Government Freight, and (2) the Jurisdiction of the District Court Under the Federal Declaratory Judgments Act to Resolve the Controversy Over the Ownership of This Revenue on a Record Which Contains All the Relevant Evidence Which Either Side Could Offer on the Subject.

The equalization agreement between each petitioner and the Government plainly states that petitioner will accord the Government a reduced rate on the condition (R. 1252, 1255, 1259) that it be required to bear only the land grant deductions accruing in Central Territory. We respectfully ask this Court to observe the contradiction and confusion which marks the Court of Appeals' treatment of this condition. The opinion states:

> "These contracts [land grant equalization agreements] are entered into voluntarily by the railroads; and they may, in so far as the government is concerned, contain such conditions, restrictions and limitations as the railroads filing them desire to impose." (R. 1791; 155 F. 2d. 767, 769.)
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> "Clearly, it seems to us, the Agreement read as a whole means that defendants will accept and receive shipments for the government *at the lowest net rates available*, but that for through traffic over connecting lines from or to points outside of Central Freight Association Territory they will divide the revenues only on the territorial basis. The decree makes this *divisional formula* binding upon the plaintiffs who are not parties to it. Thus a contract is imposed upon plaintiffs to which they have not consented." (R. 1798; 155 F. 2d. 767, 772.)

The court's conclusion, it will be seen, is that notwithstanding the plain language of the exception, the petitioners' agreements mean that "defendants [petitioners] will accept and receive shipments for the government *at the lowest net rates available,*" and that the purpose of the exception is to impose a "divisional formula" upon the respondents. The court thus holds, first, that the provision did not operate in the slightest degree to qualify petitioners' holding out to the Government of "the lowest net rates available," and second, that it is ineffective as a "divisional formula," and consequently had no effect whatsoever. The result is that after recognizing, in words, that a non-land grant road may handle land grant traffic upon "such conditions, restrictions and limitations" as it may impose, the court finally concludes that such provisions accomplish nothing because they have no effect upon the rights or duties of the equalizing road, the Government, or connecting lines.

Every equalizing road uses "exceptions" and "conditions" to qualify and define its holding out, and has done so since the beginning of such agreements. The effect of the opinion below is to hold that these provisions are utterly futile and meaningless.

Petitioners' prayer for a determination of this controversy under the Declaratory Judgments Act is met by the Court of Appeals with what seems to us the ironic statement that the parties must agree on the matter in dispute or bring another suit in equity. The action of the District Court in resolving the dispute is vacated because the parties are not in agreement.

We desire to point out that the decision of the Court of Appeals (1) denies petitioners their right under Section 22 of the Interstate Commerce Act to determine the basis on which they will transport Government freight, and (2)

effectively nullifies the purpose of the Declaratory Judgments Act.

Section 22 of the Interstate Commerce Act provides "that nothing in this part shall prevent the carriage or transportation of property free or at reduced rates, for the United States." (49 U. S. C. Sec. 22.)

It cannot be doubted that petitioners have done everything that they can do to fix the measure of the reduced charge for which they are willing to transport land grant traffic. They have never entered into any undertaking or arrangement of any kind with respondents respecting the transportation of this freight or the compensation therefor. Their several agreements are with the Government alone, and provide as clearly as English speech permits, that petitioners will transport this freight upon the condition that they participate only in the deductions plainly identified in their equalization agreements. For the transportation service through Central Territory by petitioners, the Government indisputably pays to the settling road the amount which the public at large would receive for that service (*i. e.*, the commercial rate) reduced only by the stipulated deductions.[1] (R. 1677, 1678.) The respondents, which are the terminating roads on west bound traffic and, therefore, the settling roads, refuse to turn that sum over to petitioners, but reduce it further by applying also a part of the deductions accruing out of land grant mileage in their own (Southwestern) territory. That is the basis of distribution on which respondents are willing to agree. It follows, therefore, that when the Court of Appeals says

[1] Exhibit J, unprinted because of its size, shows by reference to actual shipments, the Government's method of computing the net charge in each rate territory, and the different basis on which the revenue is being distributed by the respondents as the settling roads.

there must be an agreement between the roads, it is holding that petitioners do not have the right to determine the measure of the reduced charge which they will accord the Government under Section 22 of the Interstate Commerce Act, but instead, that they must transport such freight, regardless of the explicit condition on which they undertake the service, for such compensation as the terminating road, which has physical possession of the revenue is willing, in its mercy, to accord. More specifically, in view of the position of respondents, the practical effect of what the Court of Appeals has said (while probably not intended) is that the petitioners may not handle this freight for the Government unless they are willing to bear all the deductions in their own territory and, in addition, a part of the deductions accruing in Southwestern Territory. The only alternative to this result, in the opinion of the Court of Appeals, is for petitioners to permit their claims to accrue and seek to enforce them through multiple suits in equity.

All of the parties to this cause asked for a judgment resolving this controversy, and placed in the record all the evidence they could produce on the subject. We submit that if the Court of Appeals means that the basis for judgment in "a proper suit in equity" must be some evidence *other than the several equalization agreements*,[1] then it is effectively denying to each line the right, through a clear agreement with the Government, to control the measure of the reduced charge which it will accord the Government on land grant traffic.

On the Court of Appeals' theory that the ownership of the sums received by the settling road is not governed by

[1] This appears to be the meaning of the opinion. Notwithstanding the fact that the several equalization agreements are in evidence, the Court states: "No basis for determining a proper division of such past earnings by the parties to this suit is either pleaded or proven in this case."

the equalization agreements, and that the basis for distributing the revenue for the future can be established only by agreement of the several roads, or by the exercise of legislative power, what is to be the basis for judgment in the suggested suit in equity? The Court of Appeals has sustained the District Court in holding that there is no contract between the parties governing the ownership of the revenue, and it does not appear what different or better evidence exists or could be offered in any other proceeding than the compensation which each of the parties has agreed to accept in its individual agreement with the Government. If, as we believe, the suggested suit in equity would have to be determined on the basis of a fair interpretation of the several equalization agreements then, we submit, the Court of Appeals erred in denying the jurisdiction of the District Court to resolve the controversy under the Declaratory Judgments Act, as it did, by interpreting the equalization agreements on the basis of all of the evidence, and decreeing that that interpretation be observed in the settlements.

The Federal Declaratory Judgments Act, Judicial Code, Section 274d, 28 U. S. C. Sec. 400, provides in part as follows:

> "(1) * * * the courts of the United States shall have power * * * to declare rights and other legal relations of any interested party petitioning for such declaration, *whether or not further relief is or could be prayed*, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.
>
> "(2) *Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper* * * *." (Italics supplied.)

In reliance on these provisions of the Act the courts have granted injunctive relief when necessary to resolve the

controversy, and to prevent such a multiplicity of suits as would be required by the opinion below. *United States Galvanizing & Plating Equipment Corporation* v. *Hudson-Van Winkle-Munning Co.*, 104 F. (2d) 856 (C. C. A. 4th, 1939); *National Cosmetologists' Ass'n. Inc.* v. *Philad Co.*, 41 F. Supp. 701 (D. Del., 1941), affirmed in 129 F. (2d) 1020 (C. C. A. 3rd, 1942.)

By forcing the parties to seek a solution of this actual controversy "in a proper suit in equity," or a multiplicity of such suits, the Court of Appeals would defeat the primary purpose of the Declaratory Judgments Act. "The Federal Declaratory Judgment Act is a regulation of procedure providing a new remedy for application in actions at law and suits in equity within the jurisdiction of the federal courts; and there is nothing to suggest that its use is to be confined to cases in which no other adequate remedy is available." (*Stephenson, et al.* v. *Equitable Life Assur. Soc. of the United States*, 92 F. (2d) 406, 409.)

Rule 57 of the Federal Rules of Civil Procedure for the District Courts of the United States provides in part as follows:

> "* * * The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate * * *."

The official Notes to the Rules, prepared by the Advisory Committee appointed by the Supreme Court of the United States, provide in the Note relating to Rule 57:

> "The fact that a declaratory judgment may be granted 'whether or not further relief is or could be prayed' indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary."

In 3 Moore's *Federal Practice*, page 3204, the following appears:

> "If an action for a declaratory judgment is brought and damages or other affirmative relief may then be had such relief should be claimed; otherwise the plaintiff should be considered as having split his cause of action. As an additional consideration it may be noted that this practice should be enforced, since the purpose of a declaratory judgment is to put an end to a controversy."

We submit that the Court of Appeals erred in denying the power of the District Court to settle this controversy as prayed by both parties, on the basis of the best evidence which both parties were able to adduce on the subject.

Petitioners respectfully ask this Court to review that part of the judgment of the Circuit Court of Appeals which modifies the judgment of the District Court "by eliminating therefrom the declaratory and injunctive relief granted the defendants."

DOUGLAS F. SMITH,
KENNETH F. BURGESS,
ROBERT A. SPRECHER,
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E. C. HARTMAN,
Attorneys for Petitioners.

Of Counsel:
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GUERNSEY ORCUTT,
SIDLEY, AUSTIN, BURGESS & HARPER.

September 1, 1946.

APPENDIX A.

DEFENDANTS' EXHIBIT D-2 R. 1251-3.

Serving the public since 1827

The Baltimore and Ohio Railroad Company
Office of Vice-President
Freight Traffic and Commercial Development
Baltimore 1, Md.

Golder Shumate
Vice-President

October 12, 1943

Freight Land-Grant Equalization Agreement

United States of America,
Chief of Transportation,
War Department,
Washington, D. C.

SIR:

1. The Baltimore and Ohio Railroad Company (Lines Buffalo, Pittsburgh, Wheeling, Parkersburg, Kenova and West), hereinafter called "this carrier," hereby agrees, subject to the conditions and exceptions stated below, to accept, for the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from lawful rates filed with the Interstate Commerce Commission or the various State Commissions applying from point of origin to destination at time of movement.

2. Conditions—

(a) On traffic destined to and/or received from points on lines of other carriers this agreement will apply only in connection with such carriers as have an agreement of the form stated in paragraph 1 above on file with the Chief of Transportation, War Department, Washington, D. C., except as otherwise provided under the heading of "Exceptions" in paragraph 3 below.

(b) On traffic destined to and/or received from points on lines of other carriers this agreement is subject also to the exceptions in the agreements of each individual carrier forming part of the through route of movement, on file with the Chief of Transportation, War Department, Washington, D. C., except as may be otherwise provided under the heading of "Exceptions" in paragraph 3 below.

3. Exceptions—

(a) On traffic moving in connection with Trunk Line and New England Freight Association carriers and/or carriers performing services such as car ferry, floatage, lighterage, and/or switching only, the provisions of Condition (a) of the Agreement, as shown in paragraph 2 above are hereby waived to the extent that any land-grant deductions which are not participated in by any of said carriers by reason of their not having freight land-grant equalization agreements on file with the Chief of Transportation, War Department, Washington, D. C., will be absorbed by agreement carriers participating in the through movement; *Provided*, That each carrier, other than Trunk Line and New England Freight Association carriers and/or carriers performing services such as car ferry, floatage, lighterage, and/or switching only, forming part of through route of movement has a freight land-grant equalization agreement containing this exception on file with the Chief of Transportation, War Department, Washington, D. C.

(b) On traffic moving via all-rail routes this car-

rier will not equalize net rates which are established via rail and water routes. (note: The use of lighterage and/or floatage and/or car ferry service only shall not be construed as rail and water carriage and rate, if and when an otherwise rail rate is employed.)

(c) The participation of this carrier in rates derived through land-grant deductions is subject to the limitation that this carrier will participate only in deductions for the land-grant mileages within Central Freight Association Territory of the lines of railroad in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive.

4. This agreement becomes effective January 1, 1944, and remains in effect during the remainder of the calendar year ending December 31, 1944, and thereafter from year to year unless this carrier files notice of withdrawal or change with the Chief of Transportation, War Department, Washington, D. C., at least sixty days prior to the beginning of any calendar year.

Respectfully submitted,

THE BALTIMORE AND OHIO RAILROAD COMPANY,
(Lines Buffalo, Pittsburgh, Wheeling, Parkersburg, Kenova and West)
By: GOLDER SHUMATE,
Vice President.

Accepted by the United States of America.

By: DARRELL T. LANE,
Office of the Chief of Transportation,
War Department.

Date: 29 December, 1943.

DARRELL T. LANE,
Major, Transportation Corps,
Purchasing and Contracting Officer.

(PLAINTIFFS' EXHIBIT 23—WILSON. R. 347.)

Standard Freight Land-Grant Equalization Agreement.

ST. LOUIS, MISSOURI, May 18, 1939.

The Quartermaster General,
War Department,
Washington, D. C.

SIR:

1. The Missouri Pacific Railroad Company hereinafter called this carrier, hereby agrees, subject to the conditions and exceptions stated below, to accept for the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from lawful rates filed with the Interstate Commerce Commission or the various State Commissions applying from point of origin to destination at time of movement.

2. Conditions—

(a) On traffic destined to and/or received from points on lines of other carriers this agreement will only apply in connection with such carriers as have an agreement of the form stated in paragraph 1 above on file with The Quartermaster General, War Department, Washington, D. C., except as otherwise provided under the heading of Exceptions in paragraph 3 below.

(b) On traffic destined to and/or received from points on lines of other carriers this agreement is subject also to the exceptions in the agreements of each individual carrier forming part of the through route of movement, on file with The Quartermaster General, War Department, Washington, D. C., except as may be otherwise provided under the heading of Exceptions in paragraph 3 below.

3. Exceptions—

(a) On traffic moving in connection with Trunk Line and New England Freight Association carriers and/or carriers performing services such as car ferry, floatage, lighterage, and/or switching only, the provisions of Condition (a) in paragraph 2 above are hereby waived to the extent that any land-grant deductions which are not participated in by any of said carriers by reason of their not having freight land-grant equalization agreements on file with The Quartermaster General, War Department, Washington, D. C., will be absorbed by agreement carriers participating in the through movement: Provided, that each carrier, other than Trunk Line and New England Freight Association carriers and/or carriers performing services such as car ferry, floatage, lighterage, and/or switching only, forming part of through route of movement has a freight land-grant equalization agreement containing this exception on file with The Quartermaster General, War Department, Washington, D. C.

(b) On traffic moving in connection with initial line-haul railroads and/or last line-haul railroads, other than those carriers enumerated in Exception (a) who do not have freight land-grant equalization agreements on file with the Quartermaster General, War Department, Washington, D. C., the provisions of Condition (a) in paragraph 2 above are hereby waived with respect to such initial line-haul railroads and/or last line-haul railroads; provided that if other agreement carriers form part of a through route of movement each agreement carrier shall have this exception in its freight land-grant equalization agreement on file with the Quartermaster General, War Department, Washington, D. C.

(c) On traffic moving via all-rail routes this carrier will not equalize net rates which are established via rail and water routes. (Note.—The use of lighterage and/or floatage and/or car ferry service only shall not be construed as rail and water carriage and rate, if and when an otherwise rail rate is employed.)

(d) On traffic moving to, from or through Central Freight Association territory the provisions of Condition (b) in paragraph 2 above are hereby waived to the extent that any restrictive exceptions contained in the agreements of Central Freight Association carriers on file with The Quartermaster General, War Department, Washington, D. C., **shall not operate to restrict equalization to or from junctions with said Central Freight Association carriers.** (Emphasis added.)

4. This agreement becomes effective May 18, 1939 and remains in effect during the remainder of the calendar year ending December 31, 1939, and thereafter from year to year unless this carrier files notice of withdrawal or change with The Quartermaster General, War Department, Washington, D. C., at least sixty days prior to the beginning of any calendar year.

5. This agreement cancels all previous equalization agreements, if any, on freight traffic filed by this carrier.

Respectfully submitted,

MISSOURI PACIFIC RAILROAD COMPANY,
(Name of Carrier)
(Signed) C. H. GUION,
(Authorized Representative)
Freight Traffic Manager.
(Title)

Accepted for The Quartermaster General.
By: (Signed) WILBUR S. ELLIOTT,
WILBUR S. ELLIOTT,
Major, Q. M. Corps, Ass't.

Date: August 3, 1939.

(Executed in triplicate.)

Note:—Three signed copies to be forwarded to The Quartermaster General, one of which will be returned to the carrier upon acceptance.

Office - Supreme Court, U. S.
OCT 18 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 463

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION; THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION; AND THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION,
Petitioners,

vs.

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR; FRANK A. THOMPSON, TRUSTEE, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR; AND BERRYMAN HENWOOD, TRUSTEE, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEBTOR,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

DOUGLAS F. SMITH,
KENNETH F. BURGESS,
ROBERT A. SPRECHER,
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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

As both groups of roads are now petitioners and respondents, the Baltimore and Ohio, the New York Central and the Pennsylvania, appellees below and petitioners in No. 463, will sometimes be referred to as the Central roads, and the Missouri Pacific, the St. Louis-San Francisco and

the St. Louis Southwestern, appellants below and petitioners in No. 552, as the Southwestern roads. This is the Central roads' reply to the brief in opposition; their brief in opposition to the Southwestern roads' petition in No. 552 will be filed promptly.

The Southwestern roads' brief in opposition seems designed to serve also as a preface to their own petition, and it may be useful, therefore, to state very briefly, and in one place, the opposing contentions in the Circuit Court of Appeals which this Court is asked to review by the respective petitions for certiorari.

The Southwestern Roads' Petition for Certiorari.

Until recently the Southwestern roads recognized that the ownership and distribution of revenue derived from the handling of Government freight under land grant equalization agreements was governed by the terms of the several individual agreements with the Government. "For over thirty years each of the parties to this case, regardless of which were the collecting or settling carrier, carried [bore] the land grant deduction in the territory served by it." (Opinion of District Court, R. 1664.) When the Southwestern roads changed their practice, it was on the asserted ground that they were warranted in doing so by changes in the equalization agreements (Opinion, R. 1664).

Only six weeks before this suit was brought, counsel for one of the respondents,[1] groping around for some means to defeat the clear limitations stated in the Central roads' equalization agreements, and to force those roads to bear part of the land grant deductions accruing in the southwest, conceived the idea of contending that more than

[1]Letter of M. G. Roberts, General Counsel, St. Louis-San Francisco Railway Company, of September 24, 1943, to counsel for the Central roads (R. 463).

three years before, the traffic officers of the several roads had entered into a contract agreeing to distribute revenues derived through equalization agreements, on the basis which had been prescribed by the Interstate Commerce Commission for the division of commercial rates. (See opinion of District Court, R. 1708-1709.)

No one had ever before suggested the existence of such an agreement. In a long opinion (R. 1660-1731) reviewing the record, the District Judge held that the alleged agreement had never been made and that the evidence establishing that fact was overwhelming.[1] The Court of Appeals held that conclusion of the District Court to be "abundantly sustained by the evidence." (R. 1794.)

In short, the Southwestern roads sought to prove an agreement fixing the ownership of land grant revenues on a different basis from that stated in the equalization agreements. The District Court who saw the witnesses and heard the evidence found as a fact that the parties never entered into the alleged agreement, and the Court of Appeals affirmed. Shorn of all embellishments, what the Southwestern lines ask in No. 552 is simply that this Court review the conclusion of both courts below that respondents had failed to prove the making of the contract on which they rested their entire case.

The Central Roads' Petition for Certiorari.

By their answer and prayer for declaratory judgment, the Central roads denied the existence of the agreement alleged in the complaint, and asked the court to adjudge and declare that the Central roads are not obliged to bear any land grant deductions other than those specifically equalized by them in their several, individual equalization agreements with the Government. The District

[1]See also Findings of Fact 36 to 40, inclusive, R. 1722-1724; Conclusions of Law 2 to 7, inclusive, R. 1727-1729.

Court so held. The Court of Appeals modified the decree of the District Court by eliminating the affirmative relief granted the Central roads and, as thus modified, approved the decree. The court then denied a motion to reconsider that feature of its judgment, with one judge voting to grant the Central roads' petition for reconsideration. It may fairly be concluded, we suggest, that the four judges who have participated in the case are evenly divided on the propriety of affirmative relief to the Central roads.

ARGUMENT.

The respondents have grown bold. They argue, in effect, that they have uncovered a blind spot in the law. Having lost their contention that the parties had entered into an agreement governing the allocation of land grant revenue, respondents now assert that no power exists in the courts to compel them, as the settling roads, to account to the Central roads for the sums which come into their hands in payment of the transportation services performed by the Central roads.

Respondents themselves asked the District Court to resolve this controversy. (Complaint, subparagraph (a), R. 14.) The District Court did so. It resolved it against them. Now they argue that the court had power only to resolve it in their favor. Exploiting the windfall which they would receive from the action of the Circuit Court of Appeals in striking the affirmative relief granted petitioners, respondents insist that the sums received by them under the equalization agreements are beyond the reach of judicial process. Their argument permits of no other interpretation.

Both courts below have held against respondents' contention that the parties made an agreement governing the ownership and allocation of land grant revenue. That judgment defeated the sole contention by which respondents sought to avoid the plain terms of the Central roads' equalization agreements (See Complaint, R. 15, Subparagraph (c)). On the whole record the District Court then resolved the controversy by declaring that each group of roads had equalized and must bear the land grant deductions in its own territory, exactly as each had done in actual practice for a generation. The Circuit Court of Appeals eliminated this conclusion from the decree on the ground that the District Court "exceeded its jurisdiction" (R.

1795) and remitted the parties to "a proper suit in equity" (R. 1798).

Respondents do not suggest, of course, that while asking the District Court to resolve this controversy (See Complaint, Subparagraph (a), R. 14) they withheld evidence from that court which was necessary to its determination, and that they would present that evidence to the court in the "proper suit in equity" to which the parties are remitted by the judgment of the Court of Appeals. By that procedure respondents would have split their cause of action. What respondents are contending, therefore, is that *with all the evidence before it* the District Court could decide only their way, and that a decision for petitioners "was beyond judicial power."[1] As the Court will see, respondents are making it very plain that in their view the revenues which will be coming into their hands from this service for many months, are beyond the reach of the courts, and that they may distribute to the Central roads as much, or as little, or nothing, as may suit their pleasure.

Statement—Respondents' Brief In Opposition—Pages 1-2.[2]

Respondents' statement refers principally to the matter involved in respondents' own petition for certiorari, namely their effort to defeat the equalization agreements by the contention that the traffic officers of the two groups of roads had agreed to use Division Sheet 200-A as the basis for distributing land grant revenues, instead of the basis provided by the equalization agreements. That division sheet was issued for the sole purpose of placing in the hands of the auditors who make the interline settlements, a convenient statement

[1]Respondents' brief in opposition, page 11 and page 13.

[2]Reply is made to respondents' points in opposition under the same headings and in the same order in which they appear in the respondents' brief.

of the divisional basis of joint rates established by the Interstate Commerce Commission in the Southwestern-Official Divisions Case, 216 I. C. C. 687 (1936); 234 I. C. C. 135 (1939). As stated above, the District Court held that no agreement had been made that that division sheet was to supersede the equalization agreements as the basis for determining the ownership of revenues accruing under such agreements.

The method used by the War Department in arriving at the net land grant rate *applicable in each rate territory* is clearly stated in the opinion of the District Court, and respondents have never challenged a single statement of fact in that exhaustive opinion (R. 1677-8). Specifically, the Government ascertains the amount that the public at large would pay (*i. e.*, the commercial charge), for the transportation across Central Territory, deducts therefrom the land grant deductions accruing *in that territory*, and the remainder, the net rate for that service, is sent, as a matter of convenience, to the settling line, for distribution to the Central roads, to which it separately accrued. The same process is followed in computing the net rate applicable in Southwestern Territory. What the Central roads asked, and what the District Court held they are entitled to receive, is the net rate for the service performed by them, exactly as computed by the Government.

Questions Presented. Respondents' Brief in Opposition—Pages 2-3.

Although respondents are themselves seeking certiorari (in No. 552), they imply that the issues which petitioners ask this Court to review have been rendered moot by the repeal of the land grant laws. They do not take the responsibility of making a specific declaration to that effect because they know that it will be years before the interline settlements will be completed on this land grant

traffic. This is because the Government's General Accounting Office, which audits the amounts payable under the equalization agreements, is still working on the bills rendered by the railroads in the last quarter of 1944. Moreover, on a great volume of freight moving since 1941, it is common knowledge that final settlements will be deferred by disputes which have already arisen as to whether the traffic is of such a nature as to be entitled to land grant rates, and therefore, subject to the equalization agreements.

Nor does the repeal of the Land Grant Act have any bearing on the questions involving the application of the Federal Declaratory Judgments Act which arise out of the holding that the District Court was without jurisdiction (R. 1795) finally to resolve this controversy and remitting petitioners to "a proper suit in equity" (R. 1798), notwithstanding the fact that both parties asked for a declaratory judgment and offered all the evidence they had.

I.

Respondents' Brief In Opposition—Pages 4-5.

Respondents cite *Southern Railway Company* v. *United States* (1944), 322 U. S. 72, 88 L. Ed. 1144, but we do not perceive that it has the faintest relevance to this controversy. Of course each several land grant equalization agreement is a rate making agreement. The respondents not only recognized but insisted, until recently, that each such agreement establishes the reduced charge to which the agreeing road consents. It is an agreement by that road to accept, as its separate charge, the amount which would be paid by the public for the same service,—reduced, however, by certain land grant deductions which are identified in various "conditions" and "exceptions" embodied in the agreement. The sole purpose of such conditions and ex-

ceptions is to limit and govern the deductions to which the equalizing road consents.

We ask the Court to observe the critical and conclusive language of the respective agreements governing the distribution of revenue from a shipment moving over the lines of petitioner, Baltimore and Ohio, and respondent, Missouri Pacific, and to note how clearly each road has limited its equalization to the deductions in its own territory.

The equalization agreement of the Baltimore and Ohio provides:

> "The participation of this carrier in rates derived through land-grant deductions is subject to the limitation that this carrier will participate only in deductions for the land-grant mileages within Central Freight Association territory of the lines of railroad in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive." (Ex. D-2, par. 3(c), R. 1252.) (The land grant deductions thus specified are all of those accruing in Central Territory in which petitioners operate.)

The equalization agreement of the Missouri Pacific provides that its "restrictive exceptions * * * shall not operate to restrict [its] equalization *to or from junctions with said Central Freight Association carriers.*" (The full text of these vital provisions is shown in the footnote.)[1]

---

[1] "2. Conditions—

* * * * *

"(b) On traffic destined to and/or received from points on lines of other carriers this agreement is subject also to the exceptions in the agreements of each individual carrier forming part of the through route of movement, on file with The Quartermaster General, War Department, Washington, D. C.,

The District Court held on the whole record, including the interpretation which the parties had themselves placed upon the equalization agreements for many years, that each of the respective groups of roads had undertaken to bear the land grant deductions in their own territory. He required that in the future, as they had before the dispute arose, the parties make settlements on that basis. (Decree R. 1731.)

The excerpts quoted on page five of the brief in opposition are from a letter written in reply to a letter from a traffic officer of The Pennsylvania Railroad which appears in the record at pages 378 to 380. These letters were occasioned by the following circumstances: Until September of 1934, both groups of carriers interpreted the equalization agreements to require the Central roads to bear the deductions in Central Territory, and the Southwestern roads to bear the deductions in Southwestern Territory, and settled on that basis. There was no dispute.[1] The Cen-

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except as may be otherwise provided under the heading of Exceptions in paragraph 3 below.

"3. Exceptions—

• • • • •

"(d) On traffic moving to, from or through Central Freight Association territory the provisions of Condition (b) in paragraph 2 above are hereby waived to the extent that any restrictive exceptions contained in the agreements of Central Freight Association carriers on file with The Quartermaster General, War Department, Washington, D. C., **shall not operate to restrict equalization to or from junctions with said Central Freight Association carriers.**" (Emphasis added.) (R. 347-9.)

[1]Witness Wilson, Assistant Freight Traffic Manager of respondent Missouri Pacific, testified on cross-examination as follows:

"Q. When you changed your practice in 1934, following the change in the Eastern Lines' equalization agreements, you recognized at that time, did you not, that the matter of who bears the deduction is determined by equalization agreements, doesn't that follow from what you said?

"A. Well, I should think that is correct." (R. 242)

And in their reply brief in the Circuit Court of Appeals respondents make this revealing and significant statement:

tral roads then amended their equalization agreements for the reasons and with the result stated by the District Court. (Opinion, 1671-3) Two of the respondents claimed that the change in the equalization agreements warranted a departure from the traditional method of settlement (R. 1664), thus emphasizing their recognition of the fact that the settlements were governed by the terms of the equalization agreements. The Central roads immediately proposed to change the agreements again in such manner as to remove any possible ambiguity. The letters referred to above were written at that time. The War Department desired to hold restrictive provisions to a minimum and to have no part in policing the settlements between the roads. The officer in charge (R. 826) expressed the view that the settlements should be made on a territorial basis as in the past. The letter referred to the fact that there had been no dispute in the past, and expressed the hope that the matter could be worked out without further change in the equalization agreements. The Central roads then made a long effort to induce the Missouri Pacific and the St. Louis Southwestern to go back to the historic basis of settlement. When it failed, the Government, without any further objection, joined in agreements with the Central roads which plainly limit the deductions equalized by them to those accruing in Central Territory.

"On page 38 of their brief appellees state that for over thirty years prior to 1934 each of the parties to this case, regardless of which was the collecting or settling carrier, carried the land grant deductions in the territory served by it. Prior to September 1934 the Eastern Lines carried *restrictive exceptions* in their equalization agreements. Therefore, there were not 'wide open' equalization agreements between the two territories." (p. 9)

The current equalization agreements of the Central roads now contain "restrictive exceptions" which are unmistakable. It was precisely for the purpose of defeating those restrictive exceptions that counsel resorted to the contention that an agreement had been made which overrode and nullified the equalization agreements. Both courts below have held that that agreement was not made, and the present situation, therefore, by respondents' own admission, is exactly the same as it was prior to 1934 when respondents settled on the territorial basis.

II.

Respondents' Brief In Opposition—Page 6.

For the most part respondents' argument simply assumes the correctness of the Court of Appeals' modification of the District Court's decree. It *assumes* that the sums paid the settling road constitute a fund of common ownership, and *being so*, that petitioners "could not lawfully force upon these respondents a unilateral formula for division of joint revenues." (p. 6) There is no such common fund, and that argument begs the very question which this Court is asked to review. The theory that there is such a fund ignores the essential nature and function of the equalization agreements and would make meaningless and ridiculous the elaborate system of limiting conditions and exceptions by which each road has, from the beginning, controlled and fixed the measure of the reduced rate which it has accorded the Government. It ignores the fact, as the District Court found, and as we shall show this Court if permitted to do so, that each of the respondents insisted, prior to this suit, that every road had the right to determine for itself, and by its own equalization agreement, the measure of the reduced compensation which it would receive from this traffic. (See footnote, this brief, pages 10 and 11.)

III.

Respondents' Brief In Opposition—Pages 6-7.

Here, again, respondents beg the question which we ask this Court to decide, by assuming that the settling road has an undivided interest in every dollar of this revenue which comes into its hands for distribution,—they assume that there is a common fund to be divided.

As shown below, and as stated by the District Court, the Government computes *separately* the net land grant rate applicable in each rate territory. (Opinion, R. 1677-78.) It is the net rate, so computed, for the service over the Central roads, that was paid by the Government as a matter of convenience to the Southwestern roads for account of the Central roads, and which the latter are entitled to receive, as two of the respondents recognized for thirty years,—as respondent St. Louis and San Francisco recognized until September of 1942 and as the principal Southwestern roads recognize today. (Opinion of District Court, R. 1673, 1674.)

A full statement of the method of calculating the net rates is not embraced in the equalization agreements because it is derived from the land grant statute and War Department Circular 5-A. The statute provides:

> "Charges For Transportation By Land-Grant Railroads Subject to Regulation by Congress. Payment shall be made at such rates as the Secretary of War shall deem just and reasonable and *shall not exceed 50 per centum* of the full amount of compensation, computed on the basis *of the tariff or lower special rates for like transportation performed for the public at large,* * * *." (43 Stat. 486; 10 U. S. C. A. Sec. 1375.)

Circular 5-A of the Office of the Quartermaster General, War Department, provides in part:

> "Where joint traffic is involved, the *net rates* or fares will be determined by dividing the through rates or fares between individual carriers comprising the route according to commercial division bases and *applying to the separate proportions accruing to land-grant railroads percentages published herein.*"[1] (Ex. A, R. 423.)

The commercial divisions are used in the process only for

[1]The percentages shown in Circular 5-A which are used in computing the net rates for the transportation service across Central Territory, express, in terms of percentages, the deductions specifically identified and equalized by petitioners in their respective equalization agreements.

the purpose for which they exist, namely, to break down the commercial rates, and thus obtain the amounts which the public pays for "like transportation performed for the public at large" in the respective rate territories. The net rate in each territory is then determined by reducing each such "separate proportion" by the land grant deductions accruing in that particular territory. (Opinion of District Court R. 1677-1678.)

IV.

Respondents' Brief In Opposition—Pages 7-8.

The Circuit Court of Appeals held categorically that net land grant rates created by several, separate equalization agreements between individual roads and the Government are *not* "joint rates." (R. 1794.) Nevertheless, it vacated the affirmative relief granted by the District Court on the ground stated by this Court in the *Terminal R. R. Association Case*,[1] that "The making of rates is a legislative and not a judicial function. The division of *joint rates* is also legislative in character." That case had nothing to do with net land grant equalization rates or the ownership of the revenues derived from such agreements. The making of net land grant rates by equalization agreements is not a legislative function. Such rates are purely voluntary, are created by agreements which are several and individual, and which create no commonly owned fund to be "divided" by legislative act or otherwise. The Interstate Commerce Commission never has any official knowledge of the existence of such agreements or rates. (Letters from Secretary of Commission, R. 698, 699.)

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[1] *Terminal R. R. Assn.* v. *United States*, (1924) 266 U. S. 17. In the paragraph immediately preceding the statement quoted from the *Terminal Case*, the Supreme Court said:

> "All rates have been set forth by tariffs; and the divisions of the charges among the participating carriers have been shown by their division sheets filed with the Interstate Commerce Commission."

The Court of Appeals held that the several equalization agreements "are entered into voluntarily by the railroads; and they may, insofar as the government is concerned, contain such conditions, restrictions and limitations as the railroads filing them desire to impose." (R. 1791.) As shown in our initial brief, however, its conclusion annuls that principle, and would make meaningless the elaborate system of exceptions and conditions by which each equalizing road has always fixed the measure of the reduced charge which it accords the Government.

Respondents' remaining discussion under this head consists of argument in support of its own petition, and a confusing reference to the computation of net land grant rates, a process which is clearly described in the opinion of the District Court.

V.

Respondents' Brief In Opposition—Pages 9-11.

Respondents assert that petitioners' "argument might have some point had these shipments moved under a combination of local rates." The term "combination of local rates," like the term "joint rates" refers to a type of commercial rates, i. e., rates published and filed with the Interstate Commerce Commission for application to freight shipped by the public at large. Technically, the net land grant rates created by the several equalization agreements of the Central and Southwestern roads do not constitute a combination of local rates, but if the writ is granted we shall show that if the net rates created by these equalization agreements, computed separately for each rate territory, are to be analogized to commercial rates at all, they partake more of the nature of a combination of local rates than of joint rates. The net charge is computed separately for each territory, and could be paid separately. For convenience the Government lumps the separate sums together and remits to the terminal road, exactly as does

the commercial shipper whose freight moves on a combination of locals. In neither instance is there any matter of "divisions" involved. A road does not force a "divisional formula" upon its connection when it publishes a local rate which is used in combination with another rate of the same character. Nor does an equalizing road do so when it makes an agreement with the Government that it will only equalize the land grant deductions in its own territory, and thus fixes the measure of the reduced rate which it will accord the Government. Throughout the long history of such agreements every equalizing road has changed the scope of its equalization time and again. Never before was it suggested that in doing so it was imposing a "divisional formula" upon its connections.

VI.

Respondents' Brief In Opposition—Pages 11-12.

If the Central roads cannot themselves control the measure of the reduced charge which they will accord the Government for the transportation of Government freight over their own lines, through their individual equalization agreements with the Government, but must accept whatever compensation respondents may agree in their mercy to let them have, then it is manifest, we submit, that respondents are denied their statutory right under Section 22 of the Interstate Commerce Act.[1] In their current equalization agreements the Central roads have done everything in their power to exercise their right under Section 22 to control the measure of the reduced rate which they are willing to accord the Government on this freight.

VII.

Respondents' Brief In Opposition—Pages 12-14.

We assume that respondents will scarcely deny that on each shipment of this Government freight in respect to

[1] "That nothing in this part shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, * * *." (U. S. Code, title 49, Sec. 22.)

which they serve as the terminal and collecting roads, they do actually receive sums of money, in some amount, which the Government pays for the transportation services over the Central roads, and which respondents must, therefore, hold in trust for the Central roads. On a record which contained all the evidence bearing upon the ownership of those sums which either side could present in support of their respective prayers for declaratory judgment, the District Court resolved the controversy. The declaration that in so doing the District Court "exceeded its jurisdiction" (R. 1795) is that of the Court of Appeals, not of petitioners.

Again in this section of their brief, respondents beg the essential question by assuming that the sums received by them for distribution constitute a fund of common ownership which the courts cannot reach unless it be established that respondents agreed to give some of it up. Here, again, therefore, respondents are stating in the plainest language that a decree declaring their liability to account to the Central roads for the sums held by them is "beyond judicial power." (p. 13.) Of course, they are not admitting that they split their cause of action and that they have other evidence as to the basis for distribution which would be offered in "a proper suit in equity." They are asserting that with all relevant evidence before the Court the sums received by them are beyond the reach of judicial process.

We earnestly ask the Court to grant the writ.

Respectfully submitted,

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October 15, 1946.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 463.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation; THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation; and THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,
Petitioners,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor; FRANK A. THOMPSON, Trustee, St. Louis-San Francisco Railway Company, Debtor; and BERRYMAN HENWOOD, Trustee, St. Louis Southwestern Railway Company, Debtor,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Public Law 256, 79th Cong., Ch. 573, 1st Session, approved Dec. 12, 1945 3

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Petitioners' statement of the matter involved would have been more informative had it made clear the following uncontroverted facts:

Effective April 1, 1940, petitioners and respondents, with other roads, issued a jointly formulated division

sheet[1] by which they agreed upon percentages for division of revenue from all-rail joint rates between Official and Southwestern territories (R. 597, 630, 690, 865, 872). This division sheet did not except the equalizing rates in issue (R. 632, 633). Those equalizing rates are single-factor rates for joint transportation over two railroads (Ex. 13, R. 327; Ex. 17, R. 175; Ex. 21, R. 191; R. 681, 682.) The "single fund" paid by the government results from applying the single-factor rate to the weight of the shipment (R. 681-682). The equalization agreements contain no provisions by which such single-factor rates can be broken down to the "specific sum" for each road claimed by petitioners to result from the equalization agreement (Ex. D-2, R. 1251-1253; Appendix A, Petition herein). In obtaining their so-called "specific sums," petitioners themselves resort to the division sheet for the percentages they apply to the commercial rate in order to get the respective proportions from which they then make the land grant deductions on a territorial basis. The government is interested only in the rate to be paid, not in the division of revenue therefrom between the carriers (Ex. 29, R. 380-383).

QUESTION PRESENTED.

Petitioners' initial reason for granting the writ is that this is the first case presenting a controversy between connecting railroads over the "ownership and distribution" of sums paid by the government for the transporta-

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1 This division sheet, which was printed and distributed among its participating carriers, appears as Exhibit 1 in the Record transmitted to this Court. Its scope and intention, and the rights, obligations, duties and liabilities it confers or imposes, are determinable from the provisions appearing on the first four pages of the document. These pages have been printed as a part of the Record herein (R. 75-81). The remaining pages list the parties to the instrument, the stations covered, and the percentages to be applied, and by stipulation below and in this Court have not been printed as a part of the Record. The original exhibit, comprising the entire document, has been transmitted to this Court as a part of the Record.

tion of freight under land grant equalization agreements. Petitioners do not mention, however, that this also may be the *last* case involving such a controversy. *Public Law 256 —79th Cong. Ch. 573—1st Session*, approved December 12, 1945, terminates land grant deductions on all government traffic effective October 1, 1946. That statute (not cited in the petition but prominently set forth in their brief below when petitioners sought affirmance of the District Court's decree) removes the subject matter upon which land grant equalization agreements operate. Accordingly, such agreements presently in effect will have no bearing on future traffic, and no reason will exist for entering such agreements after October 1, 1946.

The injunction, which petitioners wish this Court to reinstate, as rightly observed by the Circuit Court of Appeals, "does not purport to apply to completed transactions" and "could not do so" under the nature of this case and the evidence introduced (R. 1797). There will be no future transactions to which the decree may apply. The lengthy petition, therefore, reduces itself to the simple point of whether, by reversing that now inoperable decree, the Circuit Court of Appeals established or applied any principles of law that raise a question of substance justifying this Court's review.

The question petitioners present, although variously stated in their petition, comes down to this: were their separate equalization agreements with the government, to which these respondents were not parties and which were filed for the purpose of offering reduced rates for joint transportation, contracts for the division of those rates?

The Circuit Court of Appeals held not. That holding, as we shall show, was wholly consonant with decisions of this Court. It also accords patently with every legal principle and fact involved in deciding it. It, therefore, presents no question of substance for this Court to review.

ARGUMENT.

I.

The Circuit Court of Appeals Rightly Held That the Purpose of the Equalization Agreement Was to Make Rates, Not to Fix Divisions.

The Circuit Court of Appeals recognized that the purpose of the equalization agreement was to make rates, not to fix divisions. Its view accords with the recent decision of this Court in *Southern Railway Co. v. United States* (1944), 322 U. S. 72, 88 L. ed. 1144. There, this Court observed that equalization agreements are "*rate-making agreements*" filed under § 22 of the Interstate Commerce Act. That Section pertains only to the making, not to the division, of reduced rates. Of equalization agreements, which it recognized were designed to obtain government business on both local and through movements, this Court there said (322 U. S. 76):

> "It must be remembered that the equalization agreement was *a rate making agreement.* Its object was to divert shipments to the non-land-grant route. The land-grant route was chosen merely for the purpose of computing the rate . . . The United States was bargaining for low rates for the shipment of its property . . . The *standard* it prescribes is 'the lowest net rates lawfully available.' "[2]

Manifestly, the only function of the equalization agreement is to offer the government a rate meeting that standard. The government is the only other contracting party. It is interested in the rate quoted, not in division of the revenue. That is why, by its letter of May 21, 1935 to one of these petitioners, concerning a divisional clause proposed

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2 All italics in this brief are respondents'.

for insertion in a freight land-grant equalization agreement, the War Department stated (Ex. 29, R. 380-383):

> "It seems to this office that this *is a matter of divisions.* It appears from your reference to the practice obtaining, that the method of divisions in your particular case has been established or settled for some time past. As the matter of division of revenue is *of a private nature* or an *internal arrangement as between and among the carriers,* this office has no official information as to how net revenue accruing on Government shipments may be divided in interline settlements in a particular case.
>
> "However, it is respectfully suggested that this matter of division of net revenue accruing be handled by you with the lines in interest *as a subject of divisions,* rather than by incorporating any restrictive clause or exception in your freight land-grant equalization agreement.
>
> • • • • • • •
>
> "The equalization agreements are *for the purpose* of giving the equalizing carrier traffic and advising the Government that it will be required *only to pay via the equalizing route the lowest net land-grant rate available via any route.* It is earnestly hoped that your lines and the other carriers interested may work out an arrangement whereby the division of net revenue accruing on Government traffic may be adjusted *as a division matter* but not include any such provisions in the equalization agreements."

The effect given to the equalization agreements by the Court below is plainly consonant both with this administrative view and with this Court's decision in the *Southern Railway Company* case.

II.

The Circuit Court of Appeals Rightly Held That a Divisional Formula Can Not Be Imposed by Unilateral Action.

To petitioners' freight land grant equalization agreements with the government these respondents were not parties. In view of that fact, the Circuit Court of Appeals held that petitioners, by provisions inserted in their equalization agreements, could not lawfully force upon these respondents a unilateral formula for division of joint revenues. In so holding, the Court below conformed to principles announced by this Court in *Alton Railroad Company v. U. S.* (1932), 287 U. S. 229, 236, 77 L. ed. 275, 280. There, as here, certain eastern lines, on joint traffic as to which they were the collecting carriers, sought to impose by force on the Alton a division of revenues to which it had not agreed. This Court held the effort unlawful, saying that "unless a readjustment of the divisions has been made either by the parties or by the Commission . . . connecting carriers were legally without power to reduce the divisions of the Alton over its objection." That is what the Circuit Court of Appeals has said of petitioners' like effort in this case (R. 1796-1798).

III.

Essential Element of Any Agreement for the Division of Joint Revenue Is Provision of the Percentages Controlling the Division, Which the Equalization Agreement Does Not Contain.

Every agreement or order for the division of joint revenue by its nature must supply the factors and percentages by which the revenue shall be divided. An agreement lacking such provisions cannot define the proportions by

which revenue computed at a single rate, and paid as a single sum, shall be divided.

Freight land grant equalization agreements do not supply such percentages (R. 40). The reason is clear. They deal with rates, not with divisions. Petitioners would have this Court hold that their equalization agreements "solely" establish divisions. Yet they themselves resort to the division sheet they term inapplicable in order to find the percentages they use in dividing this revenue. That fact alone aptly illustrates the degree to which the equalization agreement falls short of being a contract for division of joint revenue.

IV.

The Circuit Court of Appeals Rightly Held That the District Court Had No Power to Prescribe Divisions of Joint Revenue.

Having rightly determined that the equalization agreement was not a contract for division of joint revenue, and could not lawfully operate to impose such divisions unilaterally, the Circuit Court of Appeals held that by its injunction the District Court in effect had prescribed divisions of joint revenue, and that because such prescription is a legislative, not a judicial, function, the Court had exceeded its powers (R. 1795, 1798). This holding is squarely in accord with the principles announced in *Terminal R. R. Association v. United States* (1924), 266 U. S. 17, 30, 69 L. ed. 151, 156, where this Court said:

> "The making of rates is a legislative, and not a judicial, function.[3] *The division of joint rates is also*

[3] Citing *Keller v. Potomac Electric Co.*, 261 U. S. 428, 440, 67 L. ed. 731, 735, 43 Sup. Ct. Rep. 445; *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287, 289, 64 L. ed. 908, 914, P. U. R. 1920 E, 814, 40 Sup. Ct. Rep. 527; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 305, 58 L. ed. 229, 239, 34 Sup. Ct. Rep. 48; *Interstate Commerce Commission v. United States*, 224 U. S. 474, 483, 56 L. ed. 849, 853, 32 Sup. Ct. Rep. 556; *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67.

> *legislative in character.* The Interstate Commerce Commission is authorized to establish through routes and joint rates, and to prescribe conditions upon which such routes shall be operated, and to fix divisions of such rates among carriers. § 15 (1), (3), (6), Interstate Commerce Act, February 28, 1920; § 418, chap. 91, 41 Stat. at L. 485, 486, Comp. Stat. § 8583, Fed. Stat. Anno. Supp. 1920, p. 107. It is well settled, as a general rule, that the question of the reasonableness of rates or of divisions of joint rates will not be considered by the courts before application has been made to the Commission."

More recently, in *Baltimore and Ohio Railroad Company v. United States* (1936), 298 U. S. 349, 356, 80 L. ed. 1209, 1217, this Court again held that "the prescribing of divisions is a legislative function."[4]

Petitioners, however, assert that the Circuit Court of Appeals "misconstrued and misapplied" this Court's decision in the *Terminal Railroad Association* case. They base that assertion upon the following four reasons (Petition p. 15):

(a) That "there has never been an agreement between these roads overriding the equalization agreements and *providing a basis* for the allocation of revenues accruing under such agreements." Petitioners, for the moment, forget that *the division sheet* has always been regarded by them as providing the percentages by which these revenues are allocated. In supplying these percentages, the division sheet provides the *only* basis that exists for that allocation.

(b) That "for over forty years every road . . . recog-

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4 Citing: *Terminal R. Asso. v. United States*, 266 U. S. 17, 30, 69 L. ed. 150, 155, 45 S. Ct. 5. Cf. *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 227, 53 L. ed. 150, 158, 159, 29 S. Ct. 67; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 305, 307, 58 L. ed. 229, 239, 240, 34 S. Ct. 48.

nized that the revenue to be received . . . under an equalization agreement is governed, not by an agreement between the several roads . . . but *solely* by that road's individual equalization agreement with the Government." If governed *solely* by the equalization agreement, whence come the percentages petitioners themselves apply? They are not found in the equalization agreement. They are established by the division sheet.

(c) That "the equalization agreement of each . . . is in such terms . . . that it never absorbs any land grant deductions or otherwise suffers a diminution of its revenue . . . without its full and complete consent." The division sheet had the full and complete consent of both petitioners and respondents. It is the divisional formula inserted in the equalization agreements that lacks such consent.

(d) That "each of the respondents amended its own equalization agreement *with the Government* . . . contemporaneously with . . . petitioners' agreements *with the Government.*" The fault of this statement is its irrelevancy.

V.

Single-Factor Rates for Joint Transportation Are Joint Rates and Necessarily Produce Joint Revenue to Be Divided by Accepted Principles Governing Such Division.

Petitioners would avoid application of this Court's decisions by the specious argument that the revenue in issue is not joint revenue. They assert that in some manner it consists of "certain specific sums which are owned by (the) connecting roads, and not a single fund of common ownership in which all participating roads have an undivided interest" (Petition, p. 13; Brief, pp. 26-30).

This argument might have some point had these shipments moved under a combination of local rates. Then, perhaps, the revenue from each local rate might be regarded as a "specific sum." *But the equalization agreements do not establish local rates for joint movement.* These equalizing rates are single-factor rates for joint transportation over two railroads (R. 175, 195, 327, 681, 682). The "single fund" comes from applying that single rate to the weight of the shipment. There is no way by which the single rate can be applied to obtain separate "specific sums" for each road. If there were, this controversy would not have arisen. The "specific sums" result from a division of this joint revenue. That division necessarily is made by determining the proportion of the single fund due each road under percentages for dividing joint revenue established by the division sheet.

The government does not make that allocation. It cannot do so through any means supplied by the equalization agreement, which contains no percentages for such allocation. Like any other shipper of property that is jointly transported under a single-factor rate, the government pays the delivering line the full charges computed by applying the single rate to the weight of the shipment (R. 175, 195, 327, 681, 682). It does so, not as a matter of convenience, but because no other rate or sum is established by the equalization agreement.

When petitioners say that the government pays the charges in a single sum merely as a matter of convenience, they imply to this Court that there exists an alternative by which the government could pay each line a specific sum. But petitioners nowhere describe that alternative. Their reticence is understandable. The division sheet, which they assert to be inapplicable, supplies the only means of determining the allocation. From that instrument the petitioners themselves obtain the percentages they use when as collecting lines they divide this revenue. To that

instrument the government would have to resort if it undertook to make the divisions for the carriers in remitting the charges. For until the percentages supplied by the division sheet are applied, there is no "specific sum" in existence or determinable. But neither the government nor any other shipper applies division sheets in paying the charge assessed for joint movement over two lines. Division sheets are operative only between carriers. They are not published to the public like tariffs. They are a private arrangement for dividing revenue *after* it is paid by the shipper. That, and not mere convenience, is why the government makes these payments in a single sum (Ex. 29, R. 380-383).

On this "specific sum" argument petitioners' whole claim to a writ, in ultimate analysis, is based.[5] For unless these equalization rates produce the "specific sums" petitioners assert, they produce the "single fund."

In ordering division of that single fund by a formula to which respondents had not agreed the District Court prescribed division of joint revenue. The holding that this function, being legislative in character, was beyond judicial powers accords fully with the settled doctrine of this Court.

VI.

The Circuit Court of Appeals Did Not Deny to Petitioners Their Rights Under § 22 of the Interstate Commerce Act.

Petitioners assert that in vacating the declaratory and injunctive relief the Circuit Court of Appeals denied them their right under § 22 of the Interstate Commerce Act to

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[5] On page 26 of their brief, petitioners say: "The fundamental error of the Court of Appeals arose out of its belief that the settling road had by some means acquired an undivided property interest in the revenue . . ."

determine the measure of reduced charges to be accorded government traffic.

The measure of reduced charges accorded by the equalization agreements was "the lowest net land grant rate" available. Petitioners remain free, under the decision below, to accord that measure, or any other, under § 22. What the Circuit Court of Appeals said is (R. 1796):

> "Neither can one carrier by inserting conditions and restrictions in its equalizing land grant contract with the government make such restrictions binding upon another carrier without the other carrier's consent."

Manifestly, by this decision the Court below did not deny petitioners their freedom of contract. The Court only found that petitioners' contract was with the government, not with respondents. All that petitioners were denied was the right to impose on respondents, without their consent, petitioners' unilateral formula for dividing joint revenue. Neither § 22 of the Interstate Commerce Act nor any other provision of law confers upon petitioners such a right.

VII.

No Question Regarding Power to Issue Injunction Under Federal Declaratory Judgments Act Is Involved.

Half of petitioners' "questions presented" concern whether the District Court had jurisdiction under the Federal Declaratory Judgments Act to issue the injunction; and among the reasons urged for granting the writ, and the errors specified, petitioners assert that the Circuit Court of Appeals wrongfully denied such jurisdiction. Three of the four judicial precedents cited in the entire petition go likewise to that point.

Yet these respondents have never asserted, nor did the Circuit Court of Appeals hold, that under the Federal Declaratory Judgments Act the District Court was without power, in declaring the meaning of a contract, to implement its declaration with a proper injunction. Indeed, respondents sought an injunction, too (R. 15). What respondents assert, and the Court below held, is that the freight land grant equalization agreement was *not* a contract for the division of joint revenue. Because it was not a contract imposing the divisions that petitioners contend for, the action of the District Court, in enjoining such divisions upon respondents without contractual basis, was a judicial prescription of divisions. This was beyond the Court's powers, as the *Terminal Railroad Association* and *Baltimore & Ohio Railroad Company* cases make utterly clear. The Federal Declaratory Judgments Act manifestly conferred no legislative powers on the District Court.

Further, petitioners assert that reversal of the injunction deprived the District Court of "jurisdiction to resolve the controversy." The petitioners asked the District Court to resolve the controversy by declaring that the divisional formula in their equalization agreements was binding upon respondents. It did so. The Circuit Court of Appeals held the formula *not* binding upon respondents (R. 1798, 1799). That holding reversed the meaning declared for the equalization agreement by the District Court. Reversal of the declaratory relief left nothing for the injunction to implement. The injunction, lacking a contract to enforce, was plainly a prescription of divisions beyond judicial power. To say that the decision below deprived the District Court of power to resolve the controversy is the same as saying that the District Court had an inviolable right to resolve the controversy wrongly.

CONCLUSION.

The petition presents no question of sufficient substance to warrant review by this Court.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

TOLL R. WARE,

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CLYDE W. FIDDES,

Attorneys for Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor; Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, Debtor; and Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Debtor,

Respondents.

September, 1946.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 552.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor; FRANK A. THOMPSON, Trustee, St. Louis-San Francisco Railway Company, Debtor; and BERRYMAN HENWOOD, Trustee, St. Louis Southwestern Railway Company, Debtor,
Petitioners,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation; THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation; and THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

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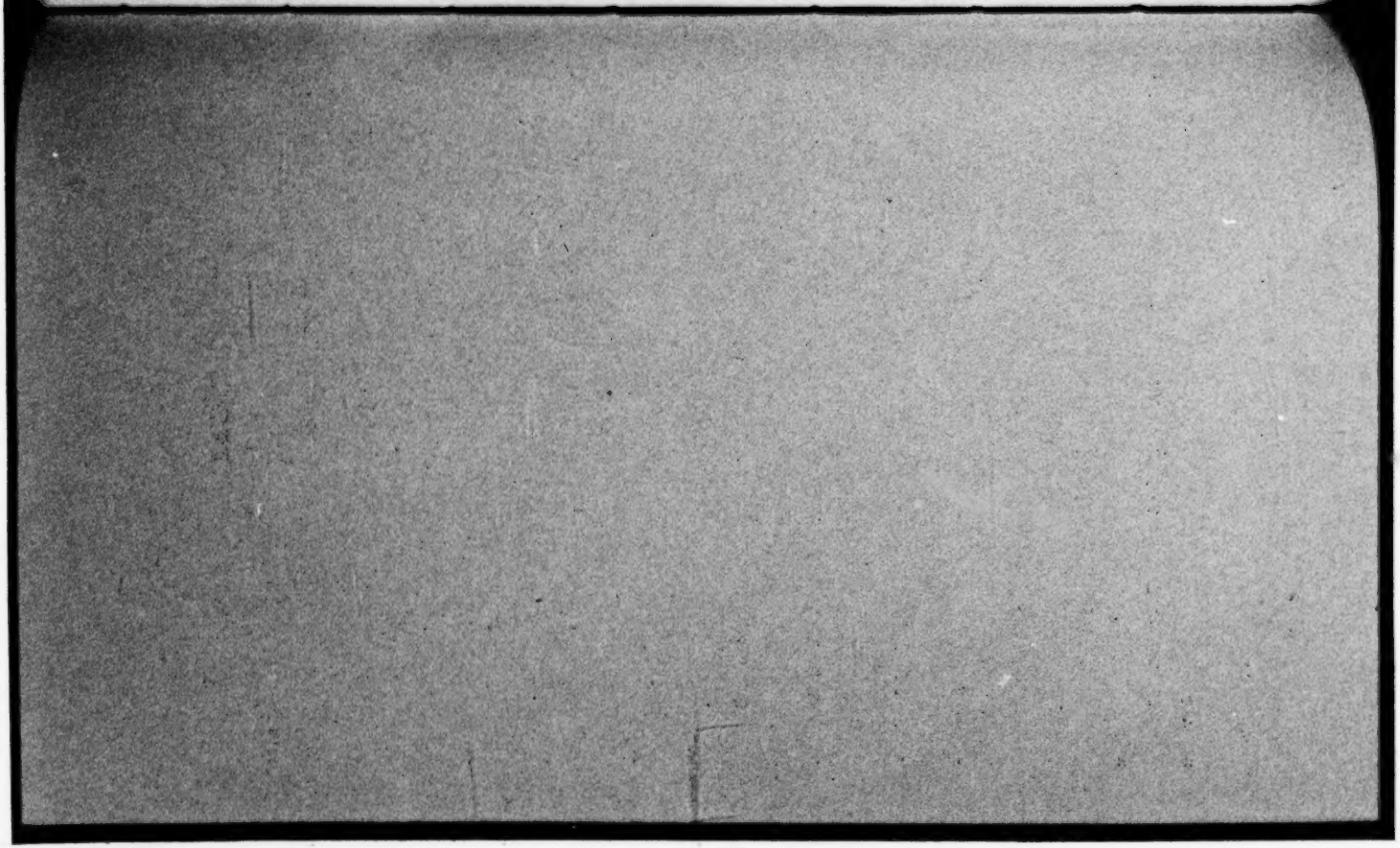

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. .....

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor; FRANK A. THOMPSON, Trustee, St. Louis-San Francisco Railway Company, Debtor; and BERRYMAN HENWOOD, Trustee, St. Louis Southwestern Railway Company, Debtor,
Petitioners,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation; THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation; and THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

Petitioners above named pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, entered in the above cause[1] on June 10, 1946, affirming in part and reversing in part a decision of the District Court of the United States for the Eastern District of Missouri, Eastern Division.

1 Docketed below as Case No. 13129—Civil, in which petitioners and respondents herein were appellants and appellees, respectively.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 1788-1798) is reported in 155 F. (2) 767. The opinion of the District Court (R. 1659-1731) is reported in 59 F. Supp. 21.

JURISDICTION.

The judgment of the court below was entered June 10, 1946 (R. 1799-1800). Timely petitions for rehearing, filed by petitioners and respondents respectively, were considered and denied by order entered July 26, 1946 (R. 1867). The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., § 347).

QUESTIONS PRESENTED.

1. Whether rates, equalizing net land grant rates, offered the government by freight land grant equalization agreements, are "land grant rates" or reduced rates tendered pursuant to § 22 of the Interstate Commerce Act.

2. Whether such equalizing rates, when expressed as a single factor charge for joint transportation over two railroads, are joint rates as a matter of law or are denied that status by reason of not being filed with the Interstate Commerce Commission and published in tariff form.

3. Whether the Interstate Commerce Commission is without jurisdiction or power over such equalizing rates.

4. Whether the division sheet in issue, establishing percentages for dividing all-rail joint class and commodity rates, applies to such equalizing rates.

5. Whether the manner of dividing all other joint rates subject to the division sheet, namely, by applying the agreed percentages to the joint revenue actually received,

likewise governs division of revenue from joint rates made applicable by freight land grant equalization agreements.

STATUTES INVOLVED.

The Federal statutes involved are § 22 of the Interstate Commerce Act (49 U. S. C., § 22); the land grant statutes (10 U. S. C., § 1375, 49 U. S. C., § 65, and Pub. L. 256—79th Cong., Ch. 573—1st Sess., H. R. 694); and § 274-d of the Judicial Code governing declaratory judgments (28 U. S. C., § 400).

STATEMENT.

This action was brought by petitioners for a declaratory judgment under § 400 of the Judicial Code (28 U. S. C., § 400) and for an injunction (R. 14-15). Respondents, denying petitioners' claims, also prayed for a declaratory judgment and for an injunction (R. 39). The District Court denied petitioners' claims and granted respondents the relief they sought (R. 1730-1731). The Circuit Court of Appeals affirmed the denial of relief to petitioners but reversed the declaratory and injunctive relief granted respondents (R. 1799). Respondents have filed a petition for certiorari[2] seeking review by this Court of the judgment below insofar as it reverses the relief granted them by the District Court. Petitioners hereby seek review of the decision below insofar as it affirms the judgment of the District Court denying them the relief they sought.

Petitioners are trustees of separately owned and operated railroads in Southwestern Freight Bureau Territory.[3] Respondents own and operate railroads in Central Freight Association Territory and Trunk Line Territory,

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2 Docketed as Case No. 463 in this Court, October Term, 1946.

3 That territory, for the most part, lies west of the Mississippi River, and includes parts of New Mexico, Louisiana and Missouri and all of Arkansas, Oklahoma and Texas (R. 5, 32).

which with New England Territory is known as Official Classification Territory.[4] The lines of these railroads connect at gateway cities, such as St. Louis, Missouri, and Cairo, Illinois (R. 75).

The issue in litigation concerns the manner of applying percentages agreed upon in a joint division sheet to joint revenues derived from transporting military and naval property of the United States from points in one territory to points in the other[5] (R. 217, 218, 431, 432, 510, 545, 848, 1655-1656). Both eastbound and westbound movements are included (R. 1790). The shipments involved do not move over governing land grant routes (R. 1791). The rates that apply are single factor rates for transportation over two railroads (R. 175, 195, 327, 1791), made available to the government by freight land grant equalization agreements individually filed by the carriers with the War Department (Ex. D-2, R. 1251-1253). These agreements were offered to the government pursuant to § 22 of the Interstate Commerce Act (49 U. S. C., § 22). The reduced rates so offered equalize the net land grant rates available over governing land grant routes.[6] The joint revenue accruing from such rates is paid by the government to the delivering carrier, which is obligated to transmit to its connecting line the proportion of the joint revenue due the latter under lawful divisions in effect between them.

The percentages by which such joint revenue is divided

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4 That territory lies generally east of the Mississippi River and north of the Ohio River and of a line running in an easterly direction from Huntington, West Virginia, to Norfolk, Virginia (R. 5, 32).

5 The federal land grant laws (10 U. S. C., § 1375) prior to 1940 provided that for Government property carried over land grant mileage, the rate should be 50% of the applicable commercial rate. By the Transportation Act of 1940 (49 U. S. C., § 65) the land grant deductions were limited to military or naval property of the United States moving for military or naval, and not for civil use. All land grant deductions are terminated effective October 1, 1946 (Pub. L. 256—79th Cong., Ch. 573—1st Sess., H. R. 694).

6 That is, routes which if used would produce the lowest net charges to the government, by reason of land grant deductions from the commercial rate.

are established by Joint Division Sheet No. 200-A.[7] That division sheet, which became effective April 1, 1940, was formulated and issued by the Official and Southwestern lines, including petitioners and respondents, as a result of an order entered by the Interstate Commerce Commission on July 25, 1939.[8] The order directed the carriers to establish and apply certain prescribed divisions of joint all-rail interstate rates between Official and Southwestern territories. The order, however, while determining divisions generally between the territories, allowed the carriers to establish origin and destination groups, to base percentages on fair average distances, and to deviate in other respects from the order if they so agreed. Pursuant to that authorization, the division sheet deviated in some respects from, and included other matters not embraced within, the Commission's order (R. 221-223).

Since April 1, 1940, the effective date of the division sheet, the parties thereto have applied the percentages there agreed upon in dividing joint revenue derived from transportation of property for the public. In so doing, they have applied the agreed percentages to the actual revenue paid and received, with the result that the proportions so determined have reflected the transportation performed by each line. Likewise, the parties have applied these agreed percentages in dividing joint revenue from government traffic of a kind[9] not entitled to land

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[7] This division sheet was printed and distributed among its participating carriers. A copy appears as Exhibit 1 in the Record transmitted to this Court. Its scope and intention, and the rights, obligations, duties and liabilities it confers or imposes, are determinable from the provisions appearing on the first four pages of the document. These pages have been printed as a part of the Record herein (R. 75-81). The remaining pages list the parties to the instrument, the stations covered, and the percentages to be applied, and by stipulation below and in this Court have not been printed as a part of the Record. The original exhibit, comprising the entire document, has been transmitted to this Court as a part of the Record.

[8] Southwestern—Official Divisions Case, 234 I. C. C. 135.

[9] That is, not military or naval property moving for military or naval use.

grant deductions but which moved under reduced rates offered pursuant to § 22 of the Interstate Commerce Act. In so doing, the carriers likewise have applied the agreed percentages to the actual revenue. No controversy has arisen regarding either the applicability of, or the manner of applying, the agreed percentages to these joint revenues (R. 500, 501, 637). It is only as to division of revenue from equalizing rates[10] that a controversy exists. That controversy goes not to what percentages shall be applied, but only to how the agreed percentages shall be applied. Petitioners, in dividing such joint revenues when collected by them, apply the agreed percentages to the *actual* revenue paid and received for the transportation in fact performed. This is the same manner in which the agreed percentages are applied by all parties to the agreement to other joint revenues subject thereto. Respondents, on the contrary, in dividing such revenues when collected by them, apply the agreed percentages to a fictitious revenue, namely, the revenue that would have resulted had the transportation been performed at commercial rates (R. 509, 510). From the southwestern line's proportion of that theoretical revenue, respondents subtract a sum representing the statutory deductions available to the government on account of land grant mileage within Southwestern territory on the governing land-grant route. From the eastern line's proportion there is subtracted a sum representing deductions on account of land grant mileage in Official territory on the governing route (R. 175, 195, 327).

It will be noted that the real issue is not whether the division sheet supplies agreed percentages for the division of joint revenues from equalizing rates. Both the parties and the Courts below have so regarded it. The issue is

10 That is, rates, equalizing net land grant rates, made applicable to military and naval property of the United States, by freight land grant equalization agreements, when moving over a route other than the governing land grant route.

solely whether, under the terms of a division sheet which established no exceptional manner for applying the agreed percentages to this type of revenue, the respondents are free to apply those percentages in the arbitrary manner they have followed, or in any manner other than that governing all other divisions of joint revenue made pursuant to the division sheet.

Respondents base their manner of dividing this revenue on a provision inserted in their freight land grant equalization agreements, effective January 1, 1944 (R. 1730). By that provision, respondents, in agreeing with the government to apply the lowest net land grant rates on property transported jointly with other lines over non-land grant routes, inserted, in the form of a condition, a divisional formula by which respondents undertook to absorb only such land grant deductions as accrued by reason of land grant mileage in Central Freight Association Territory. The Circuit Court of Appeals has rightly held that respondents' freight land grant equalization agreements, to which petitioners are not parties, cannot lawfully be made the means of imposing, by unilateral action, that divisional formula upon petitioners (R. 1796-1798).

Respondents also sought to justify their departure from the division sheet in dividing joint revenue from equalizing rates by the claims that such rates were not joint rates, but were land grant or "net" rates; that the term "joint rates" in the division sheet embraced only published commercial rates filed with, and subject to the jurisdiction of, the Commission; and that the rates in issue were not subject to the jurisdiction of the Commission. Respondents further based their case on testimony that the parties did not intend to embrace equalization rates in formulating the division sheet, and on other parol evidence to the effect that these rates were not discussed in the conferences preceding and attending formulation and issuance of the division sheet (R. 572, 629, 657, 673, 864, 868, 870).

The District Court, upholding these contentions, held that the division sheet was not a contract for the division of joint revenue from equalizing rates. The Circuit Court of Appeals, in affirming that part of the judgment, "presumed" that the District Court disregarded all incompetent parol evidence, and held, without specifying it, that there was ample other evidence to support the findings on which the denial of relief to petitioners was based (R. 1795). The Opinion of the Circuit Court of Appeals, however, discloses that its affirmance of the District Court's judgment rested basically upon the misconceptions of law, hereinafter specified as error, by which it concluded that equalization rates are the same as land grant rates, are not joint rates, and are outside the jurisdiction of the Commission.

It is petitioners' position (1) that the rates here in issue are joint rates; (2) that the division sheet has established the percentages by which these joint rates, like all other joint rates, shall be divided by the parties thereto; (3) that application of the agreed percentages to the revenue actually received for the transportation in fact performed is the manner contemplated by the division sheet for applying the agreed percentages to the joint rates subject thereto; (4) that the division sheet contains no provision justifying respondents in applying the agreed percentages in any different manner to joint revenues derived from equalizing rates; (5) that the Courts below, in engrafting such an exception upon the contract, did so either through mistaken conceptions of the statutes and principles involved or through reliance upon incompetent parol evidence regarding the meaning of this integrated agreement; and (6) that as a matter of law, upon the evidence of record, petitioners are entitled to a judgment requiring division of these joint rates upon the basis, and in the manner, that govern all other joint rates subject to the division sheet.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the term "joint rates" embraces only commercial rates charged the public and excludes reduced rates offered the government, by equalization agreements tendered pursuant to § 22 of the Interstate Commerce Act, for the purpose of equalizing net land grant rates.

2. In holding that such equalizing rates are not subject to the jurisdiction of the Interstate Commerce Commission.

3. In holding that the evidence sustained the District Court's findings that respondents' representatives were unauthorized to contract for division of revenues derived from rates equalizing net land grant rates, did not intend to enter such a contract, and never construed or interpreted the division sheet as being such a contract.

4. In presuming that the District Court disregarded incompetent parol evidence relied upon to vary the unambiguous meaning of the agreement integrated in the division sheet.

5. In holding that the division sheet is not a contract between the parties controlling the division of revenues derived from joint transportation of government property over equalizing routes.

6. In holding that the division sheet, while establishing the percentages for dividing joint revenue derived from transportation of government property over equalizing routes, left respondents free to apply those percentages to a theoretical revenue computed from commercial rates, rather than to the revenue paid and received for the transportation actually performed.

7. In affirming the judgment of the District Court insofar as it denied the relief prayed for by petitioners.

REASONS FOR GRANTING THE WRIT.

1. During recent years, a large portion of railroad traffic has consisted of government property carried over routes other than the governing land grant routes at rates, equalizing net land grant rates, made applicable by freight land grant equalization agreements tendered pursuant to § 22 of the Interstate Commerce Act. The aggregate joint revenues derived from this volume of traffic have been substantial. The lawful division of these joint revenues is a matter of important concern not only to petitioners but to the railroads of the country generally. Whether or not a joint division sheet, which by unambiguous terms establishes percentages for the division of all-rail joint class and commodity rates, embraces equalizing rates expressed as a single factor charge for joint transportation over two railroads is a Federal question of substance which has not been, but should be, decided by this Court.

2. The division sheet unequivocally applies to all-rail joint class and commodity rates (R. 81, 631, 632). While it contains certain exceptions (R. 81, 631, 632), these do not exclude either equalizing rates or any other rates made applicable pursuant to § 22 of the Interstate Commerce Act. In the Opinion of the District Court (R. 1683-1690) and in the Opinion of the Circuit Court of Appeals (R. 1794), it is apparent that their exclusion of equalizing rates from the scope of the division sheet rested in large measure upon the holding that such rates, because tendered under § 22, without filing with the Commission or publication in tariff form, were not joint rates. If equalizing rates are precluded from being joint rates because they are not filed or published like commercial rates, then by the same reasoning no rates made applicable under authority of § 22, without filing and publication, can be joint rates. During the recent emergency, a large volume of government traffic, of a character not entitled to land grant

deductions, was transported by the railroads of this country at rates reduced below the commercial level pursuant to § 22 of the Interstate Commerce Act (R. 9, 36). This traffic was in addition to property carried at equalizing rates over non-land grant routes or at statutory land grant rates over governing land grant routes. In any future emergency, a large share of government traffic again would move under § 22 rates. The holding of the decisions below that the § 22 rates in issue, although expressed as a single factor rate for joint transportation over two railroads, are not joint rates because they are not filed and published in the manner of commercial rates, affects not only these petitioners, and other carriers party to this division sheet, but the railroads of the country generally, many of which now are, and in the future will be, parties to similar division sheets. Whether reduced rates, offered the government or others, without filing or publication under § 22, when expressed as a single factor charge for transportation over two or more railroads, are joint rates within the legal scope and meaning of that term, therefore presents a Federal question of substance which has not been, but should be, decided by this Court.

3. Petitioners at all times have sought, and now seek, only interpretation and enforcement of the division sheet, not of the Commission's order from which it resulted. But the Circuit Court of Appeals, as well as the District Court, denied relief to petitioners upon the theory that the division sheet, having been issued as a result of the Commission's order, did not embrace equalization rates because "the Commission had no jurisdiction over land grant rates and was without power to make any order concerning them" (R. 1795; 155 F. [2] 767, 771; R. 1685-1687; 59 F. Supp. 21, 36-37). This holding was premised upon two misconceptions of law, first, that the rates in issue were "land grant rates," and, second, that the promulgation of these rates under § 22, without filing or publica-

tion, put them beyond the reach of the Commission's jurisdiction.

The later premise squarely conflicts with the decision of this Court in *Nashville, C. & St. L. R. Co. v. Tennessee*, 262 U. S. 318, 67 L. ed. 999. There, this Court, in upholding the power of the Commission to increase a reduced rate tendered under § 22, held that the provisions of the latter section impose no limitations upon the Commission's power but merely limit the requirement of equality contained elsewhere in the Act.

The other premise that the rates here in issue are "land grant rates" misconceives both the land grant statutes and § 22 of the Interstate Commerce Act. Land grant rates are rates made applicable by statute for transportation of certain government property over land grant mileage. The application of such rates, when the shipment moves over land grant mileage, is compulsory. Equalizing rates apply to shipments that do *not* move over the governing land grant route (R. 1792-1793). The statute does not compel or establish them. They are voluntarily reduced rates established under § 22 of the Interstate Commerce Act. The fact that they equal the land grant rates effective by statute over the land grant route does not make them land grant rates. Neither does it make them different from any other reduced rates tendered pursuant to § 22. The holding of the decisions below that such rates are "land grant rates" and are outside the jurisdiction of the Interstate Commerce Commission is one which not only places an improper construction upon the federal land grant statutes and upon § 22 of the Interstate Commerce Act, but departs from the principles established by this Court in the *Nashville* case, and thereby presents a Federal question of substance which has not been, but should be, specifically decided by this Court.

4. The point in controversy is not *what* percentages shall be applied to the joint revenue in issue, but only *how* the

agreed percentages shall be applied. All parties to the division sheet apply its agreed percentages in dividing joint revenue from these equalizing rates (R. 431-2, 510, 545, 849, 1655-6). Respondents themselves do so. The District Court required petitioners to do so (R. 1730-1731). The reason for this unanimity is that the division sheet is the very means, and the only instrument, by which the parties have agreed upon the percentages they apply in dividing these revenues. Yet despite this fundamental, undisputed fact, the decisions below hold that the agreement does "not embrace" such revenues (R. 1730, 1794).

If this holding means that the division sheet does not supply the percentages for dividing this joint revenue, the Court below has given to the contract an effect not expressed therein and never recognized by the parties who formulated it. If, on the other hand, the holding means that while the division sheet supplies the agreed percentages, respondents are free to apply them as to this revenue in a manner different from that followed as to all other revenue, then the Court below has interpolated into this written agreement an exception not placed there by the parties and contradictory of the language which integrated their agreement. Either holding so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

5. Throughout this litigation has run the misleading concept that petitioners seek to "pass on" to respondents a portion of the statutory deductions imposed by reason of land grants made to petitioners. The District Court states in its Opinion (R. 1665; 59 F. Supp. 21, 26): "Specifically, it is this transfer, from west to east, of land grant deductions that is the crux of this case." This conception, again, confuses land grant rates with equalizing rates. Equalizing rates contain no statutory deductions. The deductions are voluntary, and have reference not to land grant

mileage embraced in the route of movement but to land grant mileage on another route over which the shipment did not move. Petitioner St. Louis Southwestern Railway Company, for example, has no land grant mileage. It has never received any grant of land from the government and has never "been paid in advance" any portion of the charges incurred on government traffic. When it quotes a reduced rate, measured by land grant deductions available over the route of some other railroad, and later divides the joint revenue by applying the agreed percentages to the revenue actually received, it does not pass on to respondents any burden imposed by statute on it. It merely divides the revenue derived from the actual service performed in accordance with the percentages agreed upon for the route of movement. This supposed transfer of land grant deductions, which exerted a strong influence upon the decisions below, misconceives the nature of the rates imposed by the land grant statutes and the character of equalizing rates voluntarily established pursuant to § 22 of the Interstate Commerce Act, and thereby presents a Federal question of substance which has not been, but should be, decided by this Court.

6. Effective October 1, 1946, land grant deductions are terminated.[11] This circumstance may be regarded by the Court as diminishing, if not removing, the reasons why a review of the judgment below should be granted. In our brief opposing these respondents' petition for a writ in Case No. 463, we have pointed out that the termination of land grant deductions makes present freight land grant equalization agreements inoperative after October 1, 1946, except as to past movements, and removes all need or occasion for such agreements in the future. The repealing statute, however, does not have that effect upon division sheets. These will continue to be needed and used as instruments for the division of joint revenues. Nor does

[11] Pub. L. 256—79th Cong., Ch. 573—1st Sess., H. R. 694.

it lessen, we believe, the substance or importance of the holdings below by which single factor rates promulgated under § 22 of the Interstate Commerce Act for application to joint transportation are held not to be joint rates. Equalization rates are only one form of § 22 rates. The reasons assigned by the Courts below for holding them not joint rates apply equally to other rates promulgated under § 22. The repeal of land grant deductions will probably increase, rather than diminish, the degree to which government property will move under rates reduced under § 22. The principles and conceptions adopted and applied by the decisions below, if not reversed by this Court, will cause uncertainty and error as to whether rates established under § 22 for joint transportation are, or can be, joint rates; whether rates so established are within or outside the scope of division sheets dealing with joint rates; and whether the Interstate Commerce Commission has, or is without, jurisdiction over such rates and the division thereof. We, therefore, submit that the repeal of land grant deductions does not diminish the substance of the questions raised by this petition.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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September, 1946.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 552

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR; FRANK A. THOMPSON, TRUSTEE, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR; AND BERRYMAN HENWOOD, TRUSTEE, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEBTOR,

Petitioners,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION; THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION; AND THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

Respondents, appellees below, filed their petition for certiorari in this court on September 4, 1946, No. 463.[1] On September 28, 1946, the Southwestern roads, appellants below, also filed a petition for certiorari.

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[1]Respondents will sometimes be referred to as the Central roads, and petitioners as the Southwestern roads.

The Southwestern roads' petition does not state fairly and clearly the question which the District Court and the Court of Appeals decided against them. We shall compare the petitioners' statement of the matter involved with the allegations of their complaint and with the District Court's statement of the single issue raised by them.

It seems to respondents that much of the discussion in the petition defies understanding. It could scarcely have been made more confusing if it had been designed to make the case appear so utterly complex that a review of the questions involved in No. 463, on which there was substantial disagreement below, would seem to carry with it, automatically, a review of the very different issue involved in No. 552, on which there was complete unanimity below.

We desire to show the Court that the single issue which petitioners tendered in their complaint was whether, on April 1, 1940, as alleged, the respective traffic officers of the two sets of roads deliberately and knowingly entered into an agreement that a certain "division sheet" then being issued by them to govern the division of commercial rates, was also to govern the ownership and allocation of revenues derived from land grant equalization agreements. The District Court heard the testimony of twenty-two witnesses, and received a great volume of documentary evidence. There was no conflict in the evidence on this issue on which petitioners rested their case. The Southwestern roads were unable to produce even one of the many officers alleged to have participated in the making of the alleged contract, who was willing to appear and testify that he had entered, or had ever considered entering, into an agreement settling the controversy over the allocation of *land grant* revenues. It was shown, and the courts below found, that the intent and the whole course of conduct of all the parties denied the existence of the alleged agreement.

The petition is so drawn as to give the impression that the conclusion which this Court is asked to review turned

on the determination of numerous highly technical questions of law. It did not. It was in essence a factual determination of whether there had been such a meeting of minds as to create the alleged agreement with respect to land grant revenues. It was the type of question which is constantly being determined by juries and by courts performing the function of a jury.

Reviewing the record in a long opinion (R. 1660-1731) the District Court held that the contract relied upon by the Southwestern roads had never been made. He found that there was "*no evidence*" (R. 1697) to support the allegation. The Circuit Court of Appeals affirmed, stating as follows:

> "These findings support the decree denying the relief demanded by the plaintiffs and they are abundantly sustained by the evidence. The testimony is voluminous. To review it here would unduly extend this opinion. Further, such a review is unnecessary because the trial court has set it out at length in its opinion.
>
> • • • • •
>
> Here the findings of the court are abundantly supported by competent evidence. *In the proceedings culminating in the issuance of the Division Sheet the parties did not consider land grant rates.*" (R. 1794-5)

In short, petitioners rested their case below on an alleged contract which they were unable to prove; instead, it was affirmatively established that the asserted agreement was not made. The undisputed facts simply forbid belief in the existence of such an agreement. Of the four judges who have participated in the proceedings below, the two opinions show that not one had the slightest doubt concerning this issue. We submit that this clear-cut determination of petitioners' failure to prove the making of an agreement does not warrant review by this Court.

Questions Presented.

We ask the Court to note the single, definitive issue tendered by the Southwestern roads' complaint, and decided against them below. Their case rested entirely on the contention that the parties had made a certain agreement which disposed of this controversy. The opinion of the District Court makes it clear that the decision against the petitioners on that issue rests on no technical definition of terms, or disputable principle of law, but on an overwhelming showing of facts.

The complaint alleges that on April 1, 1940 the officers of the respective roads agreed upon a basis for the division of "joint rates" (Par. IV, R. 7, 8), and that "the said land grant rates over non-land grant, competing or equalizing routes constitute joint rates within the meaning of the contract or agreement described in paragraph IV herein * * *." (Par. V, R. 10)

Petitioners prayed (R. 14) that the court enter judgment declaring:

> (a) the rights and obligations, duties and liabilities of plaintiffs and defendants, and each of them, as to the division or apportionment of the revenue from that Government freight. (R. 14)[1]
>
> (b) that the apportionment or division of revenue from such Government freight moving under joint land grant rates as described in Paragraph VI herein is determined, fixed and controlled by the contract described in Paragraph IV herein * * *; (R. 14-15)
>
> (c) that the provisions in the Central roads' land grant agreements limiting their equalization to the deductions accruing in Central Territory, be declared null and void on the ground that it would require a different apportionment of the revenues from that "agreed to with plaintiffs." (R. 15)

[1]The District Court did resolve the entire controversy as petitioners here prayed, but his decision was against petitioners and their position now is that he had power only to resolve it in their favor.

By their answer respondents denied the making of the alleged contract and asked also that the controversy be resolved. (R. 29-39)

It will be seen that the single ground on which petitioners asked declaratory and injunctive relief, is that the "division sheet" governing the division of commercial rates paid by the public at large is also, by its terms and intendment, an agreement governing the ownership of revenue from land grant traffic. We ask the Court particularly to observe (see subparagraph (c) above) that petitioners' effort to avoid the limitations stated in respondents' equalization agreements, and to prevent the granting of affirmative relief to respondents, likewise rested entirely on the claim that those limitations were contrary to the alleged agreement. Indeed, the record leaves no doubt that petitioners' claim that the controversy had been settled by agreement, was advanced as the only expedient which counsel could devise in their effort to defeat the limitations in the Eastern roads' equalization agreements.

The District Court, stating that "A contract is a deliberate agreement between competent parties to do or to abstain from doing some act" and that "there must be a meeting of the minds of the parties; they must assent to the same thing in the same sense," (R. 1712) held, not merely that the contract had not been proved, but that it had not been made; the Court of Appeals affirmed, and its opinion emphasizes the factual nature of the determination which this Court is asked to review.

ARGUMENT.

This Court is asked to review the holding of the District Court, affirmed by the Circuit Court of Appeals, that the parties had not entered into the contract alleged in the complaint. We respectfully suggest that a unanimous holding of both courts below that the alleged agreement was never made, and, in fact, that not one of the parties had any purpose to make such an agreement, is devoid of the "special and important reasons" (Rule 38) which are a prerequisite to granting the writ, and is not therefore the character of action which this Court will review.

Just before this suit was brought, it was asserted for the first time that three and one-half years earlier the parties had entered into an alleged contract resolving the entire controversy. The undisputed evidence showed that it had never entered the minds of any of the officers who were alleged to have made the contract (Opinion of District Court, R. 1696, 1697) that they had entered into an agreement apportioning land grant revenues, and that respondents' whole course of conduct contradicted the existence of such an agreement. The controversy continued as to every shipment which had moved since the making of the alleged agreement, exactly as before, and no one had ever believed or asserted that the matter had been settled by agreement.

The opinion of the District Court states:

> "There is no evidence that *any of the parties* to Joint Division Sheet No. 200-A intended or understood they were agreeing to a division of 'land grant rates.'" (R. 1697)
>
> "The conference of September 14, 1943, was over three years after the effective date of Division Sheet No. 200-A and to that date the record in this case is

silent of any one on behalf of any road making a claim that Division Sheet No. 200-A constituted a written contract between the eastern and western roads for the settlement of the controversy as to division of land grant rates. Ten days after the conference had adjourned counsel for the plaintiff lines, *for the first time* declared that the subject of land grant rates had been settled by a contract 'Effective April 1, 1940,' Joint Division Sheet 200-A. Is this Court to understand that such an agreement was in existence and yet during all of this period it lay hidden behind the veil of silence and that the extended correspondence and conference after conference between May 29, 1940, and September 14, 1943, was on a subject that had been settled by a binding contract? *To so hold would be to declare a contract in existence that apparently was not recognized by any of the parties to it for a period of years after its execution.*" (R. 1708-09)

The facts which make up the history of this controversy are not in dispute. To show that this petition presents no question of substance, conflict of decision, or doubt which warrants review by this Court, we desire to summarize very briefly the facts which led to counsel's eleventh hour assertion of an agreement. We shall quote below from the opinion and findings of the District Court, and in that connection it should be said that the points relied upon by petitioners on their appeal to the Circuit Court of Appeals (R. 1743-1749) will show that they did not question the accuracy of any of the trial court's statements of fact concerning the history of the controversy and the position of the parties.

Equalization agreements came into existence soon after 1900 (R. 1059, *et seq.*). Until 1934 there was no dispute concerning the proper basis of settlement. Throughout that long period each group of roads bore the deductions accruing from the competitive land grant mileage located in its own territory. "For over thirty years each of the parties to this case, regardless of which were the col-

lecting or settling carrier, *carried* [*i.e.*, absorbed and bore] the land grant deductions in the territory served by it." (Opinion R. 1664)

Petitioners concede that they recognized throughout that long period that the settlements were governed by the terms of the several equalization agreements. The Witness Wilson, Assistant Freight Traffic Manager of respondent Missouri Pacific, testified on cross-examination:

> "Q. When you changed your practice in 1934, following the change in the Eastern Lines' equalization agreements, you recognized at that time, did you not, that the matter of who bears the deduction is determined by equalization agreements, doesn't that follow from what you said?
>
> "A. Well, I should think that is correct." (R. 242)

In their brief in the Circuit Court of Appeals petitioners emphasized this fact, as follows:

> "On page 38 of their brief appellees state that for over thirty years prior to 1934 each of the parties to this case, regardless of which was the collecting or settling carrier, carried the land grant deductions in the territory served by it. Prior to September 1934 the Eastern Lines carried *restrictive exceptions* in their equalization agreements. Therefore, there were not 'wide open' equalization agreements between the two territories." (p. 9)

So much for the situation as it existed prior to September, 1934. At that time the Central roads made certain changes in their equalization agreements. After reviewing the evidence in respect to those changes, the District Court states:

> "Such were the changes, and such were the causes for the changes. Neither related to conditions in Southwestern territory or land grant agreements of plaintiffs or any other western carrier." (R. 1673)

Nevertheless, two of the petitioners immediately took advantage of those changes to depart from the historic basis of

settlement, and to force the Central roads to bear part of the land grant deductions accruing in Southwestern Territory. The District Court states:

> "Basing its action on these changes in land grant agreements by the defendants with the Government, two of the plaintiffs (Missouri Pacific Lines and St. Louis Southwestern Railway) thereupon commenced to pass on to the eastern lines part of the land grant deductions made on the western lines, in cases where they were the collecting carrier. In 1942 the other plaintiff took up the practice, in a general way, in cases where it was the collecting carrier." (R. 1664)

Petitioners' witness explained their reasons for making this change as follows:

> "In 1934, the fall of 1934, they (the Central roads) felt it advisable to amend those agreements *so as to strike out a lot of restrictions and enter into a wide open equalization.* Now, when they did that, *we took the position* that they were a party to the equalization and that, therefore, *the net* rate or the lowest land-grant rate *should be divided on a basis of the commercial divisions.*" (R. 238)

It will be seen that after 1934, as before, petitioners purported to base these settlements on the terms of the equalization agreements.

The Central roads immediately undertook to persuade the two petitioners who had changed their basis of settlement that the changes in the equalization agreements did not warrant the settlements being made by petitioners, and to induce them to go back to the traditional basis of distribution which they had recognized for so many years. That effort was continuous and unremitting over a period of several years. Throughout the entire period of such discussions (reviewed at length in the opinion of the District Court) the two petitioners continued to insist that their action was warranted, not by any alleged divisions agreement between the roads, but only by the

terms of the Central roads' equalization agreement (Opinion, R. 1698), and that they would continue their practice of forcing the Central roads to bear part of the deductions in Southwestern Territory unless and until the Central roads changed their equalization agreements.[1]

The next step is stated in the opinion of the District Court as follows:

> "Unable to settle the dispute by negotiation, defendants [Central roads] served notice in the fall of 1943 that they would cancel their 1934 land grant agreements and submit new land grant agreements worded as to leave no question, that they would only equalize land grant mileage in Central or Official Freight Association territory, *as they had previously been invited to do by one of the plaintiffs.* Whereupon, defendants were informed that in April, 1940, they had made a contract (Joint Division Sheet 200-A) by which they were not only bound to divide land grant rates by the percentages set out in the contract, but that by the contract they had estopped themselves to change their land grant agreement." (R. 1710)

The District Court stated further, as quoted on pages 6

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[1] The following statements of Petitioners are illustrative:

"Up until a few years ago, the C. F. A. carriers did not have on file with the United States Government a wide open equalization agreement and apparently they found they were being penalized in the distribution of traffic and for reasons best known to themselves, filed a wide open equalization agreement * * *." (letter of May 11, 1938, R. 1536)

"There was nothing that compelled your company to file such an agreement other than the desire to participate in Government traffic, which under the land grant act would not be routed via your line, and you have the option of cancelling this agreement any time you do not see fit to abide thereby." (letter of April 18, 1941, R. 1541)

"The signing of this agreement on the part of the Pennsylvania Railroad was purely voluntary and they are, of course, at liberty to cancel this equalization agreement whenever they see fit to do so." (letter of July 8, 1942, R. 1543)

"They feel that the land-grant equalization agreement is binding and that the Eastern lines are obligated thereby to participate with all other lines parties to the agreement in the equalization of the land-grant deductions, *so long as the agreement is in effect.*" (letter of June 16, 1942, R. 1317)

and 7 of this brief, that the claim of contract governing the allocation of land grant revenue was not advanced until September 24, 1943, that for years, and as lately as ten days before, the two petitioners had attempted to justify the basis on which they were distributing this revenue by very different, and very inconsistent claims. The court asked how petitioners could expect him to believe,

> "* * * that such an agreement was in existence and yet during all of this period it lay hidden behind the veil of silence and that the extended correspondence and conference after conference between May 29, 1940, and September 14, 1943, was on a subject that had been settled by a binding contract? *To so hold would be to declare a contract in existence that apparently was not recognized by any of the parties to it for a period of years after its execution.*" (R. 1709)

The whole opinion shows that the primary basis of the holding on this issue in the courts below was *factual*, and therefore presents "no special or important" reasons for review.

In brief, petitioners insisted that they settled on a territorial basis prior to 1934 because the Central roads' equalization agreements contained "restrictive provisions;" that the changes made in the agreements that year permitted a different basis of settlement,[1] and that they would not return to the former practice unless the Central roads entered into new equalization agreements. It was not until the fall of 1943 when the Central saw that their only recourse was to clarify their agreements in such a manner as to prevent no pretense of misconstruction, and took the necessary procedural steps to that end, that one of petitioners' counsel conceived the idea (stated for the first time on September 24, 1943, R. 463) of contending that long before (in April, 1940) the parties had made an agreement which not only resolved the whole controversy, but rendered the new equalization agreements "null and void" (Complaint, subparagraph (c) R. 15). Petitioners now ask this Court to review the un-

[1] The District Court held, to the contrary, that the changes had no such purpose or effect (R. 1676).

equivocal conclusion of both courts below that the alleged agreement was not made.

Reply to Petitioners' Specification of Errors, Petition, Page 9.

The errors asserted in paragraphs numbered 3 and 4 are not discussed by petitioners in their "Reasons for Granting the Writ" to which we reply below.

The Court of Appeals did not hold, as petitioners imply, that the testimony of the traffic officers concerning the facts surrounding the issuance of the division sheet was incompetent. It was highly competent. Furthermore, the District Court declared that the fact that the alleged agreement was not made "was conclusively shown by other evidence"—"aside from and independent of" the evidence to which petitioners objected. (Opinion of District Court, R. 1696, 1697.)

Specific Reply to Petitioners' Reasons For Granting the Writ.

1. (Petition, Page 10.)

In their petition here, as in the courts below, petitioners avoid any discussion of the controlling factual question raised by their claim that the parties had made an agreement to resolve the land grant dispute by distributing the revenues on the basis of the percentages stated in Division Sheet 200-A. The opinion of the District Court states:

> "Plaintiffs, in making their case, aside from offering in evidence Division Sheet No. 200-A, did not choose to go into any matters leading up to and surrounding the formation of that instrument." (R. 1696)

Division Sheet 200-A was issued to effectuate a decision

of the Interstate Commerce Commission fixing the basis for dividing commercial rates, and states, on its face:

> "Issued as result of Opinion and Order of the Interstate Commerce Commission, etc." (R. 75)

The Commission was not even advised on the record before it in that proceeding, that there was any controversy over the distribution of *land grant revenues*, or that land grant equalization agreements were in existence, much less the terms of such agreements. The District Court said:

> "Land grant rates were not before the Commission in any particular in the Division Case. This the parties agree upon. *It made no order for the division of land grant rates. This the parties agree upon.*" (R. 1686)

Petitioners alleged the making of a contract. Their burden was to prove that the minds of the parties met in an agreement to distribute revenues derived from equalization agreements on the same basis as that prescribed by the Commission for commercial rates. That was the decisive issue of fact on which both courts below have found the evidence to be overwhelmingly against petitioners' claim.

2. (Petition, Pages 10 and 11.)

Petitioners refer to rates which are known in the railroad business as "Section 22 quotations." (R. 603) They are so designated because they are specific rates "quoted," or offered, the Government, pursuant to the authority of Section 22 of the Interstate Commerce Act. The basic question here as to what roads equalize, and must bear, particular land grant deductions can never arise in connection with "Section 22 quotations," because such rates, by the specific terms of the "quotation" are not subject to land grant deductions. In contrast to land grant equalization rates, which are created by separate, several agreements between the government and individual roads, Sec-

tion 22 quotations covering service over two or more roads are never made until they have been the subject of discussion and agreement between all the participating roads, which always includes an understanding as to how the revenue shall be divided. (R. 609, 610)

In section 22 quotations the factor as to the location of the competitive land grant mileage out of which the deductions accrue, and the question as to what line has equalized particular deductions is not present, and the roads may agree to divide the revenue by use of the commercial division bases, or they may, and in practice frequently do, agree on some other basis. (R. 612, 613) But if they do not agree, the "quotation" is simply not made. No dispute ever arises, or could arise therefore, as to the distribution of revenue accruing from such rates, and the ownership and distribution of revenue from such rates does not touch even remotely upon the issue here.

3. (Petition, Pages 11 and 12.)

It is stated that: "Petitioners at all times have sought, and now seek, only interpretation and enforcement of the division sheet, not of the Commission's order from which it resulted."

This position was fully understood by the courts below. The opinion of the District Court points out that only ten days before petitioners' counsel conceived the idea of claiming that the parties had entered into a contract resolving the land grant controversy, counsel had insisted, not that any agreement had been made, but that the *order* of the Interstate Commerce Commission in the Southwestern—Official Divisions Case[1] prescribed the basis for allocating land grant revenues. The opinion states:

> "Before the conference, according to its minutes, this counsel expressed his opinion, not that the equalization agreements controlled the division of land grant rates, not that Division Sheet 200-A settled the controversy, but that under the order of the Interstate Commerce Commission in the Official South-

[1] 234 ICC 135 (1939).

> western Division case, 'the carriers must divide land grant rates on the divisional basis prescribed by the Commission in that proceeding.' *No such claim was urged before this Court in this case.*" (R. 1708)

It is argued that the courts below mistakenly believed that they were dealing with "land grant rates" instead of net rates derived through land grant equalization agreements. The opinions show that such a suggestion is frivolous.[1] Net rates created by equalization agreements are universally referred to as "land grant rates." Petitioners' own complaint does so, many times, for illustration see the prayer of the complaint. (R. 14, 15)

In *Nashville Railway* v. *Tennessee,* 262 U. S. 318 (320) the court held only that the railroads could not use rates made under Section 22 as an instrument to create discrimination,[2] and it has no bearing on the issues in this cause.

4. (Petition, Pages 12 and 13.)

We do not believe that the statements made in this section of the petition will either confuse or assist the Court. The opinion of the District Court states clearly the method followed by the Government in computing land grant rates. The court's discussion of the subject begins as follows:

> "The manner of ascertaining land grant rates is not a matter of choice with any carrier, party to a land grant agreement." (R. 1677, 1678)

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[1] It may be noted in this connection that two of the petitioners are land grant roads as well as equalizing roads, and that those roads have distributed the revenue on a basis which actually forced the Central roads to bear a part of petitioners' own statutory deductions. See Opinion, District Court, R. 1711.

[2] Justice Brandeis, speaking for the court, said:

> "Whether this section should be construed as denying to the Interstate Commerce Commission power to prohibit such reduced rates, even where they result in unjust discrimination or in undue prejudice to interstate commerce is the main question for decision." (p. 320.)

5. (Petition, Pages 13 and 14.)

For several years petitioners have been trying, by one theory or another, to justify their practice of settling on a basis which forces the Central roads to bear, not only all of the deductions accruing out of the competitive land grant mileage located in Central Territory where the Central roads operate, but also a part of the deductions arising out of land grant mileage in Southwestern Territory where petitioners operate. The contention, rejected by the courts below, that the Central roads agreed to such a basis is simply the latest of several theories which they have advanced and then abandoned. (Opinion, District Court, R. 1707, 1708)

In this section petitioners endeavor to explain away the fundamental immorality or inequity of their effort to force upon the Central roads the burden of bearing a portion of the deductions accruing in the Southwest. They say they have been hurt by such a view of their position. It is because the Central roads have desired to handle Government freight in competition with the land grant mileage in Central Territory, and have been willing to absorb and make their lines "equal" to such mileage, but only to such mileage, that they specifically limit their equalization to the deductions arising in their own territory. For example the equalization agreement of Respondent Baltimore and Ohio, provides:

> "The participation of this carrier in rates derived through land-grant deductions is subject to the limitation that this carrier will participate only in deductions for the land-grant mileages within Central Freight Association territory of the lines of railroad in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive." (Ex. D-2, par. 3(c), R. 1252; Ex. E-2, par. 3(d), R. 1255; Ex. F-2, par. 3(d), R. 1259) (The land grant deductions thus specified are all of those accruing in Central Territory in which petitioners operate.)

It is because of exactly the same considerations that the equalization agreement of the connecting road operating in Southwestern territory, Petitioner Missouri Pacific, provides that its "restrictive exceptions * * * shall not operate to restrict [its] equalization *to or from junctions with said Central Freight Association carriers.*" (R. 347)

Through all the years prior to the Fall of 1934 it was not only the language of the equalization agreements, but a recognition of their essential purpose, and the basic equity and fairness of that purpose, that petitioners and respondents alike, bore the land grant deductions in the respective territories in which they operate.

6. (Petition, Pages 14 and 15.)

The alleged agreement is the sole ground on which petitioners sought to defeat the limitations in the Central roads' equalization agreement. (See Complaint, subparagraph (c), R. 15) No one can know the record in this cause and believe that such an agreement was made, and both courts below have held that it was not made. It is not surprising, therefore, that, while in form at least, asking certiorari, petitioners seem to be inviting the Court to treat the case as moot.[1] But petitioners do not take the responsibility of making a specific declaration that the case has been made moot by the repeal of the land grant statute, because they know that it will be years before the interline settlements on this traffic will be completed. This is because the Government's General Accounting Office, which audits the amounts payable under the equalization agreements, is still working on the bills rendered by the railroads in the last quarter of 1944. Moreover, on a great volume of freight

[1] The petition herein, unaccompanied by supporting brief, was filed three weeks after the filing of the petition of the Central roads in No. 463.

moving since 1941, final settlements will be deferred by disputes which have already arisen as to whether the traffic is of such a nature as to be entitled to land grant rates, and therefore, subject to the equalization agreements.

We respectfully ask the Court to deny the writ.

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October 20, 1946.